No. [illegible]

IN THE

# SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1950

STATE OF MISSOURI ex rel. JOHN M. DALTON, Attorney General, ex rel. RICHARD E. HOLEKAMP, et al.,
Appellants,

vs.

HOLEKAMP LUMBER CO., a Corporation, et al.,
Appellees.

On Appeal from the Supreme Court of the State of Missouri.

## JURISDICTIONAL STATEMENT.

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## INDEX.


| | Page |
|---|---|
| Introductory Statement | 1 |
| Jurisdiction | 2 |
| Opinions Below | 2 |
| Judgment and Opinion of Supreme Court of Missouri, Appendix A | 19 |
| Judgment and Opinion of St. Louis Court of Appeals, Appendix A | 29 |
| Judgment of St. Louis County Circuit Court, Appendix A | 57 |
| Question Presented by Appeal | 3 |
| Statutes Involved—Reference to | 4 |
| Set Out in Full—Appendix B | 58 |
| Statement of Case | 4 |
| Pleading and Presentation of Federal Questions | 6 |
| Missouri Procedure—Appendix C | 70 |
| Substantial Questions | 12 |
| Conclusion | 17 |
| Appendix A: | |
| Judgment and Decision of Supreme Court of Missouri | 19 |
| Judgment and Decision of St. Louis Court of Appeals | 29 |
| Judgment of Circuit Court, St. Louis County, Missouri | 57 |

Appendix B:

Title 23, Chapter 351, Sections 351.085, 090, 690 and 695, R. S. Mo. ..... 58

Chapter 12, Article 1, Sections 958 and 972, R. S. 1899 (Mo.) ..... 65

Title 36, Chapter 531, Section 531.010, R. S. Mo. ..... 67

Appendix C:

Information in Quo Warranto, paragraphs 11 and 13 69

Missouri Rules of Civil Procedure, Rule 83.16 and Rule 84.05 (h) ..... 70

**Citations.**

Atlantic Coast Line R. R. Co. v. Glenn S. Phillips, 332 U. S. 168, 67 Sup. Ct. 1584, 91 L. Ed. 1877 (1947) ..3, 11

Fletcher v. Peck, 6 Cranch. 87, 3 L. Ed. 162 (1810) .. 17

James Greenwood v. Union Freight R. R., 105 U. S. 13, 26 L. Ed. 961 (1881) ..... 15

John King Mfg. Co. v. City Council of Augusta, 277 U. S. 100, 45 Sup. Ct. 489, 72 L. Ed. 801 (1927) .....3, 11

Midland Truck Lines, Inc., v. Atwood, 262 Mo. 397, 241 S. W. 2nd 903 (1951) .....12, 15

Murray Winters v. People of State of New York, 333 U. S. 507, 68 Sup. Ct. 665, 92 L. Ed. 840 (1948) .....3, 11

The Proprietors of Charles River Bridge Co. v. The Warren Bridge Co. et al., 11 Peters 420, 9 L. Ed. 773 (1837) ..... 15

The Trustees of Dartmouth College v. Woodward, 4 Wheat. 518, 4 L. Ed. 629 (1819) .....3, 12, 16, 17

The Wilmington & Waldon R. R. v. Reid, 13 Wallace 264, 20 L. Ed. 568 (1872) ..... 12

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vs.

HOLEKAMP LUMBER CO., a Corporation, et al.,
Appellees.

On Appeal from the Supreme Court of the State of Missouri.

## JURISDICTIONAL STATEMENT.

### INTRODUCTORY STATEMENT.

Appellants appeal from the judgment of the Supreme Court of the State of Missouri, entered on November 14, 1960, setting aside the opinion of the St. Louis Court of Appeals entered on January 19, 1960 (modified on January 25, 1960) which judgment of the Supreme Court of the State of Missouri sustained judgment of The Circuit Court of St. Louis County, Missouri, entered on September 29, 1958, dismissing this cause "for failure to state facts

upon which relief could be granted," and submit this Statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that a substantial question is presented.

## OPINIONS BELOW.

The opinion of the Supreme Court of Missouri is reported in 340 S. W. (2nd) 678. The opinion of the St. Louis Court of Appeals is reported in 331 S. W. (2nd) 171. The judgment of the Circuit Court St. Louis County, Missouri, is not printed. Copies of all the above judgments and opinions are attached hereto as Appendix A (Record pages 73, 75, 25, 53 and 19).

## JURISDICTION.

This suit, an Information in Quo Warranto in the name of the then Attorney General of Missouri brought under authority of Section 531.010, R. S. Mo. (Appendix B, page 67), was brought to deny, among other things, the Missouri Legislative power to enact Title 23, Chapter 351, Sections 351.085, 351.090, 351.690, 351.695, R. S. Mo. and Sections have been construed by the Missouri Supreme Court to apply to Appellants, upon the belief that said Statutes are unconstitutional being in derogation of Article 1, Section 10 of the Constitution of the United States in that said Sections deprive Appellants of their vested rights, are retroactive in their operation and impair the obligations of Appellants' contract. The judgment of the Supreme Court of Missouri was entered on November 14, 1960. Appellants' motion for rehearing before the Supreme Court of Missouri was denied December 12, 1960. Notice of Appeal to the Supreme Court of the United States was filed in the Supreme Court of Missouri on February 7, 1961. The Jurisdiction of the Supreme Court to review this de-

cision by appeal is conferred by Title 28, U. S. C., Section 1257 (2). The following decisions sustain the jurisdiction of the Supreme Court to review this judgment of the Missouri Supreme Court on appeal: **Atlantic Coast Line R. R. Co. v. Glenn S. Phillips**, 332 U. S. 168, 67 Sup. Ct. 1584, 91 L. Ed. 1977 (1947); **John King Mfg. Co. v. City Council of Augusta**, 277 U. S. 100, 45 Sup. Ct. 489, 72 L. Ed. 891 (1927); **Murray Winters v. People of State of New York**, 333 U. S. 507, 68 Sup. Ct. 665, 92 L. Ed. 840 (1948); **Trustees of Dartmouth College v. Woodward**, 4 Wheat. 518, 4 L. Ed. 629 (1819).

## QUESTION PRESENTED.

Where the original period of corporate existence of the Holekamp Lumber Company, a Missouri Corporation founded in 1908, was set by agreement of shareholders at fifty (50) years, and where the Laws of Missouri then in effect required the affirmative vote of three-fourths (¾) of the shareholders to accept the provisions of the general laws of Missouri relating to corporations, and where, subsequently, general laws were passed, being Sections 351.085, 351.090, 351.690, and 351.659 of Title 23, Chapter 351, R. S. Mo., which sections authorize the extension of corporate duration upon the affirmative vote of only fifty percent (50%) of the shareholders of a corporation, and where at no time have three-fourths (¾) of the shareholders of Holekamp Lumber Company accepted the provisions of such subsequent general corporation laws, and where in 1957 the original period of duration of this Corporation was extended by vote of fifty-eight percent (58%) of the shareholders pursuant to authority contained only in such subsequent general laws, and where the Supreme Court of Missouri has held that the stockholders of this Corporation have no right under the Federal Constitution to have carried into effect the Corporate Contract provisions deter-

minating the duration of the Corporation, the question presented is: whether said Sections 351.085, 351.090, 351.690 and 351.695 R. S. Mo. are repugnant to and in violation of the Constitution of the United States as above alleged when such laws by their terms and construction authorize such extension of corporate existence over the objection of forty-two percent (42%) of the Corporation's shareholders.

## STATUTES INVOLVED.

Title 23, Chapter 351, Sections 351.085, 351.090, 351.690, 351.695, R. S. Mo. (V. A. M. S. 1949), Laws 1943, p. 410, Secs. 55, 56, 171 and 174, A. L. 1945, p. 696.

Chapter 12, Article 1, Sections 958 and 972, R. S. 1899;

Title 36, Chapter 531, Section 531.010, R. S. Mo. (V. A. M. S. 1949);

All above statutes are set out in full in Appendix B.

## STATEMENT.

The Information in Quo Warranto was filed by Appellants, the State of Missouri, at the information of John M. Dalton then the Attorney General of Missouri, and at the relation of Richard E. Holekamp and members of his family, who together are the registered owners of forty-two percent (42%) of the outstanding stock of Holekamp Lumber Company, a Missouri Corporation.

The Holekamp Lumber Company and the named individuals as owners of the remaining fifty-eight percent (58%) of the outstanding stock are the Appellees.

The Holekamp Lumber Company, hereinafter called the Corporation, was incorporated on the 10th day of March, 1908. The Articles of Agreement of said corporation,

among other things, provided in Article Sixth thereof, that the corporation shall have existence for a period of fifty (50) years.

Pursuant to the original Articles of Agreement, the corporate existence would expire on March 9, 1958.

The applicable Missouri Statutes under which this Corporation was organized was Chapter 12, Article 1, R. S. 1899, and Section 972 thereof provides:

> "The powers enumerated in the preceding section shall vest in every corporation that shall hereafter be created or organized, and any corporation, including those heretofore organized and now in existence under any general or special law of this state, may accept the provisions of the general laws of this state relating to corporations, by filing with the secretary of state a certificate of such acceptance, signed by its president and secretary, duly authorized by its board of directors and approved by a vote of three-fourths of its stockholders, at any meeting duly and legally called for that purpose—notice of such meeting first having been given in manner and form as provided in Sections 962 and 963 of this article, or by three-fourths of the stockholders in writing; and, upon the filing of such certificate, the time of the existence of said corporation shall be extended for such period as was originally permissible to it, or as may be stated in its certificate of acceptance . . . ."
> Full text is set out in Appendix B, page 66.

The Appellees as holders of the majority of the stock of the Corporation on the 3rd day of December, 1957 voted, over the objection of Appellants, to amend the Articles of Incorporation of this corporation to extend the existence of the corporation for a period of fifty (50) years from December 3rd, 1957.

The majority directors and stockholders of the corporation acted pursuant to the provisions of Title 23, Chapter 351, R. S. Mo., particularly Sections 351.085-1 and 2-(2) and 351.090-1-(3). Appendix B, pages 58, 60.

The shareholders of this corporation at no time ever accepted or voted to accept the provision of any subsequent general laws relating to corporations.

Appellants believe that they have the lawful right to have their investment terminated in the corporation on the date provided in the original Articles of Agreement. Appellants have opposed the amendment of this corporation's charter to extend its corporate life and believe that any such amendment without the affirmative vote of three fourths of the issued and outstanding shares is unlawful.

The Supreme Court of Missouri has held that the provisions of Sections 351.085-1 and 2-(2) and 351.090-1-(3), R. S. Mo. are fully constitutional and applicable to this corporation under the above set out circumstances and authorize a bare majority vote of the stockholders to amend the corporate charter of this corporation to extend its corporate existence.

## PLEADING AND PRESENTATION OF FEDERAL QUESTIONS.

Appellants first raised the question now presented to this court in their original pleading in the St. Louis County Circuit Court. The information In Quo Warranto stated in Paragraphs 11 and 13, referring to the Federal question:

> 11. ". . . Relators further state that if Title 23, Chapter 351, Section 351.090 and Section 351.695 of V. A. M. S. 1949, are applicable and controlling on plaintiffs in the manner set out above said Statutes

are in derogation of and violate the Constitution of the United States, Article 1, Section 10, in that said sections deprive relators of their vested rights, are retroactive in their operations and impair the obligations of Appellants' contract. . . .'

13. "Relators believe that said Certificate of Amendment as voted and filed by the Corporation and the defendants is void and of no effect, having been passed and voted unlawfully and contrary to relators' vested rights and privileges as aforesaid."

Full text of paragraphs 11 and 13 are set out in Appendix C, page 69 (Record pages 8 and 9).

The Circuit Court of St. Louis County disposed of the Federal Constitutional question raised by Appellants when such court sustained a Motion to Dismiss filed by all Appellees based on the ground that "The information fails to state facts upon which relief can be granted. This motion was briefed, argued and submitted" (Record pages 18 and 19). Appendix A, page 57.

On October 7, 1958, Appellants filed notice to appeal to the Supreme Court of Missouri (Record page 19).

The Supreme Court on its own motion transferred the cause to the St. Louis Court of Appeals by its order dated April 29, 1959, upon the ground that the Supreme Court was without jurisdiction to hear the cause (Record page 22). On May 14, 1959, the Supreme Court of Missouri overruled Appellants' motion to set aside the Court's order of April 29, 1959, and motion to transfer to the Court En Banc (Record page 23). Thereafter, the cause was heard by the St. Louis Court of Appeals and that court entered its decision in Appellants' (Relators') favor on January 19, 1960 (pages 1 and 26 of its opinion

were modified by the Court of Appeals on January 25, 1960) (Appendix A, pages 29 to 56) (Record pages 25 to 53). Thereafter Appellees filed in the St. Louis Court of Appeals a Motion for Rehearing or for Transfer to the Supreme Court of Missouri. This motion was overruled by the Court of Appeals on February 17, 1960 (Record page 58). Appellees on March 17, 1960, filed application for Transfer from the St. Louis Court of Appeals to the Supreme Court of Missouri (Record page 59). The Supreme Court En Banc on April 11, 1960, sustained Appellees' Application to Transfer and ordered the cause transferred to the Court En Banc (Record page 72).

The Opinion of the Supreme Court of Missouri En Banc on the issues presented—including the Federal Constitutional questions—is set out in full in Appendix A, pages 19 to 28 (Record pages 75 to 83).

Appellants preserved and presented the Federal question in the Missouri Appellate Courts in the manner required by Missouri procedure, namely, by brief under "Points Relied on, Specification of Allegations of Error with Authorities" and by Oral Argument before the Courts.

The question here presented was accepted and passed upon by the Supreme Court of Missouri En Banc as will be shown by later reference herein.

On November 25, 1960, Appellants filed in the Supreme Court of Missouri a Motion for Rehearing with "Suggestion in Support Thereof" stating among other things as grounds therefor: (Record pages 84 to 90.)

> "1.) Relators believe this Court's opinion limited the application and meaning of this Section of our present Statutes to requirement of 'Due Process' under Article 1, Section 10 of the Missouri Constitu-

tion and/or the Fifth and Fourteenth Amendments to the Federal Constitution, whereas Relators believe said Section by its terms was meant also to be applied as a limitation on legislative power imposed by Article 1, Section 13 of the Missouri Constitution (Retrospective laws and Impairment of the Obligation of Contracts) and Article 1, Section 10 of the Federal Constitution (Impairment of the Obligation of Contracts)."

Appellants in this motion questioned the Missouri Legislature's power to enact these Statutes in the terms used or as they have now been made to read by this Court's construction (Record pages 85 and 86).

Appellants' motion for rehearing was denied by the Court En Banc on December 12, 1960 (Record page 91). Under Missouri procedure no further hearing may be had by Appellants. Appendix C, page 70.

In the Information Appellants alleged that these Statutes as used by the majority shareholders offend the Federal Constitution and that Appellants' rights under that Constitution have been rejected. The Missouri Supreme Court has held Sections 351.085 and 351.090 valid and applicable to Appellants in the face of the contention that such application renders such Statutes invalid on Federal grounds. Appellants' allegation in paragraph 11 of the Information specifically drew into question Article 1, Section 10 of the United States Constitution. The same allegation, not so specifically, drew into question the Fifth and Fourteenth Amendments of the Federal Constitution. The Supreme Court of Missouri in its decision and as an integral part thereof—assumed that all these Federal questions were before it. The Court expressly considered and determined these questions. The Court's opinion stated:

"Nevertheless, even with such a reservation of power, the authority of the Legislature to amend corporate charters or to authorize stockholders to do so is not absolute. Determination of the extent of this authority requires consideration of three constitutional doctrines: Police power, due process and obligation of contracts." (Record pages 78-79.) Appendix A, page 24.

Again, the Court speaking of the contract formed upon the grant of a corporate charter said ". . . a second approach is that the legislature may make or permit a majority of the stockholders to make any changes except those which will deprive a stockholder of some vested right . . ." and further the Court in determining its own position on the "vested right" question stated "Section 351.695 of our Corporation Code enacts the vested right principle and, of course, the purpose of this is to satisfy the requirements of due process." (Record pages 79-80) Appendix A, page 24.

The Court then determined these constitutional questions by saying "We agree with the statement in the Drew Case (114 Pac. 2d l. c. 107) that merely extending the existence of a corporation for another period of the same duration as stated in its original articles does not make a change "so fundamental that it should be declared in violation of the constitution relating to impairment of the contract of the stockholders. (See also Garzo v. Maid of the Mist Steamboat Co., 303 N. Y. 516, 104 N. E. 2d 882.) Certainly authorizing an extension of corporate existence does not effect a substantial impairment of the purpose for which the corporation was organized; it does not drag these stockholders into a totally different enterprise from the one in which they intended to invest nor confiscate any of their property. We, therefore, hold that the stockholders of Holekamp had no vested right to have

its existence terminated and its assets distributed in 1958" (Record pages 80 and 81). Appendix A, page 26.

Finally the Court concluded by saying "[. . . (we) . . . have decided that minority stockholders did not have a vested right to require termination of corporate existence merely because the Articles stated a definite term. We, therefore, hold that the Court properly sustained the Motion to Dismiss for failure to state facts upon which relief could be granted" (Record page 83). Appendix A, page 28.

The Court's references in support of its ruling on these particular Constitutional points make it clear that the Court was speaking of the Federal Constitution. At best the Federal question is so interwoven with State Law that the Federal Question is neither independent of nor separable from the possible State questions.

The Court disposed of the questioned right to force the minority shareholders to begin the contract all over again by holding that the extension of the contract for another fifty years is not a substantial impairment of the purpose of the corporation or a change in its enterprise. However, the claim of Appellants was and is can they be forced to continue the contract at all beyond the period bargained for except pursuant to the vote of shareholders originally authorized.

The court's opinion recognized the Federal questions involved. The decision faced these issues and determined them; else the decision can not stand. The same judgment could not be entered upon the opposite conclusion as to the interpretation and definition of the Federal Constitutional provisions involved. **Atlantic Coast Line R. R. v. Glenn S. Phillips**, 332 U. S. 168, 67 Sup. Ct. 1584, 91 L. Ed. 1977; **John King Mfg. Co. v. City Council of Augusta**, 277 U. S. 100, 45 Sup. Ct. 489, 72 L. Ed. 801; **Murray Wil-**

ters v. People of State of New York, 333 U. S. 507, 68 Sup. Ct. 665, 92 L. Ed. 840; Trustees of Dartmouth College v. Woodward, 4 Wheat. 518, 4 L. Ed. 629.

## THE QUESTIONS ARE SUBSTANTIAL.

Appellants here urge this court to rule that the majority shareholders of Holekamp Lumber Co. are without right and authority under the Federal Constitution to amend the Corporation's Articles of Incorporation so as to extend the corporate life beyond the expiration date set forth in Article Six thereof, by simple majority vote.

The grant of a corporate charter executed and accepted Articles of Incorporation, under a given enabling act—constitutes a contract between the State, the incorporators and the corporation. The terms of that contract are the Articles of Incorporation, Statutes at the date of incorporation and the Constitution of Missouri. (While appellants can cite no case directly in point, it is submitted that the Constitution of the United States is also a part of that contract.) **Trustees of Dartmouth College v. Woodward**, 4 Wheat. 518, 4 L. Ed. 629 at 662 (1819). **Wilmington & Weldon R. R. v. Reid**, 13 Wallace 264, 20 L. Ed. 568, 569 (1872). Our Missouri courts have also so held **Midland Truck Lines v. Atwood**, 362 Mo. 397, 241 S. W. 2nd 903 (1951). The Missouri Legislature has inherent power to change its statutes subject to the provisions of the two Constitutions. It can be said generally that legislative power is unlimited save for Constitutional limitations set on it. The stockholders (those to whom the incorporators' rights descend—**Trustees of Dartmouth College v. Woodward**, supra), have only those power granted in the contract—must fulfill the terms of the contract—and can change or vary the contract only in the manner and to the extent authorized by the contract.

The Holokamp Lumber Company's Articles of Incorporation state:

> "Article Sixth: The corporation shall continue for a period of fifty years."

That period terminated March 10, 1958.

Inasmuch as the then statutes and constitutional provisions were part of the Company's charter, there must be read into these Articles of Incorporation the provision of the 1899 Corporation Laws, Section 972 (Appendix B, page 66), that the corporation's stockholders by three-fourths vote could adopt subsequent provisions of the general laws relating to corporations. This is one of the terms of the contract. It is a qualification enabling stockholders in the future to add to the Articles of Incorporation whatever provisions are later authorized by statute. But the qualification is specific—three-fourths of the stockholders must approve. There must also be read into the Company's charter the then Federal constitutional provision against impairment of the obligations of contracts and disturbance of vested rights, privileges, immunities and franchises previously granted. As of the date of incorporation all stockholders (and all parties) agreed in writing that the corporate life would cease March 10, 1958, and each stockholder's equity in the corporation would be distributed to him whatever it might be. This vested right was subject, however, to a right imposed by statute, namely, that three-fourths of the stockholders could adopt whatever later provisions the State legislature may legally make applicable to corporations. What was done to prevent Article Six from being carried into effect? The expiration date was subject to change in only one way: Adoption, by three-fourths vote of shareholders, of subsequent general laws relating to corporations which general laws could provide for a different vote and an extended life. The general laws

were changed many times to provide for extension of corporate life. In 1943 the general law was changed to provide that corporate life could be extended by way of amendment to Articles of Incorporation to grant even perpetual existence upon a majority vote of shareholders. The individual respondents have executed a certificate of amendment upon 58% vote of shareholders under Sections 351.085 and 351.090, R. S. Mo. Appellants questioned the right of the individual respondents to do this and now here question the validity of said sections under these circumstances.

The Supreme Court held that Sections 351.085 and 351.090 are retroactive in their operation pursuant to Section 351.690 and that Section 351.695 does not help Appellants for the reason no "vested right" is disturbed.

Appellants' position, in the case at bar, is not that the Holekamp Charter could never be amended to extend its corporate life. Appellants' position is that a bare majority vote was insufficient to extend the corporate life without first adopting the 1943 Statutes, as was originally provided by the initial contract.

The St. Louis Court of Appeals in its decision held that such application of the later statutes would be unconstitutional for the reason that the Missouri Constitution and Legislature never reserved power to amend Corporate Charters (Appendix A, page 43). The Supreme Court of Missouri in its treatment of the case has held that the then Missouri Constitution "by negative implication" (Appendix A, page 23), retained to the legislature the power to repeal, change and amend by general laws the laws under which corporations are formed. Appellants never questioned this power. The Missouri Supreme Court went further and held that the power was also reserved to allow retroactive amendments by majority vote only as against

three-fourths vote originally required (Appendix A, page 24). As pointed out on page 10 hereof the Court then specifically limited the application of its holding to such legislative acts as would not disturb a vested right, violate due process or obligation of contract under the Missouri and Federal Constitutions. The principles of **James Greenwood v. Union Freight R. R.**, 105 U. S. 13, 26 L. Ed. 961 (1881), are not here involved. Both the St. Louis Court of Appeals and the Supreme Court held **that the only way Appellees' action could be sanctioned is by a holding that no Constitutional right was involved.**

Appellees, having failed to follow the simple Missouri procedure of adopting the provisions of the new Corporation Code as was done in **Midland Truck Lines v. Atwood**, 362 Mo. 397, 241 S. W. 2nd 903 (supra), were left with no alternative when they wished to continue doing business on Appellants' investment. Since it has now been held for the first time in Missouri that the present statutes do authorize Appellees' act of amendment on majority vote, Appellants contend that the Federal Constitution prohibits the Missouri Legislature from so enacting the present Statutes. This Court has held that to some degree legislative acts may be retroactive and disturb vested rights except where an obligation of contract is involved. **The Proprietors of Charles River Bridge Co. v. The Warren Bridge Co. et al.**, 11 Peters 420, 9 L. ed. 773 (1837).

As applied to the Holekamp case, the right of all stockholders to have the charter provision terminating the corporate life in 50 years carried out to the letter, can not be disturbed, except by adoption by three-fourths of the shareholders of the provisions of a subsequent general law providing for some different vote.

Our courts have held that the constitution, laws and articles of incorporation of a corporation constitute a con-

tract between the State, the incorporators and the corporation. A contract, the material provisions of which cannot be impaired by one party to the contract without the consent of the other parties except and in the manner and to the extent originally provided in that contract.

The **Dartmouth College** case held as an integral part of its decision that the right to enforce the contract provisions originally vested in the original trustees of the College (incorporators) and was subsequently vested in the successive trustees of the College (stockholders).

Under the original Holekamp contract three-fourths of the shareholders had a determining voice in authorizing fundamental changes. Under the contract now authorized by the Legislature only fifty-one percent of the shareholders have such a determining voice. Twenty-four percent of the shareholders lost the determining vote in setting the conditions under which their investment shall be regulated, as Section 351.085 authorized an almost infinite number of amendments. In Section 351.090 the Legislature was careful to safeguard the financial interest of original minority shareholders in the matter of changes in the rights and preferences of their original stock. Yet on the question of the return of their investment no protection was given. Appellees here renewed the duration of the Corporation for another fifty years. They had the power under Section 351.085 to renew perpetually. The Missouri Court has held there is no difference—from the viewpoint of a contract right or vested right or due process—between fifty years one hundred years or perpetuity. The twenty-four percent of the shareholders who lost their determining voice in voting on such a change have lost a basic and fundamental right. The Court of Missouri without evidence, testimony or hearing held that the desire to discontinue the franchise after fifty years never entered the minds of any of the original shareholders. This contract

provision, it held without evidence, was strictly for the benefit of the State. Yet it can be shown, however, that one of the original incorporators is an Appellant here. Another of the original incorporators was a party defendant and has now passed away during the term of this litigation. Their testimony was not had. Such a conclusion of the Court is entirely speculative (Appendix A, page 25). The Court reasoned from the assumption that no shareholder cared about the duration of corporate life to the conclusion that the duration of the contract is not of serious concern to incorporators or investors. The same reasoning would seem to apply to all contracts.

The Supreme Court of Missouri transferred the case from the St. Louis Court of Appeals upon the grounds of public interest. The question is one of wide import and encompasses all corporate contracts present and future in all States. **Fletcher v. Peck**, 6 Cranch 87, 3 L. Ed. 162 (1810). To leave the decision stand without a ruling by this Court is to leave fundamental Constitutional interpretations decided by the Missouri Supreme Court rather than by this court. To leave the decision stand in its present form is to weaken the principle of **The Trustees of Dartmouth College v. Woodward** and to leave on the judicial records a confusion of intermingled State and Federal Constitutional principles to the detriment of contracting parties. A clear holding on the principles here involved is of immediate importance to all stockholders of the many thousands of corporations with expiring charters.

## CONCLUSION.

It is submitted that the judgment and decision of the Supreme Court of Missouri is in error in its interpretation of the rights protected under the Federal Constitution. The obligation of the terms of a contract during such contract's existence have heretofore been held protected by

this court from subsequent legislative enactment. The right of parties to enter into a contract is rendered meaningless and useless, if there is no protected right to terminate the contract according to its agreed terms, or to amend the contract only on agreed procedure. It seems basic then that the obligation to conclude the contract should also be so protected. Appellants believe the question presented by this appeal is substantial and of public importance.

Respectfully submitted,

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## APPENDIX A.

### Judgment of Supreme Court of Missouri.

On the 14th day of November, 1960, the following further proceedings were had and entered of record in said cause, to-wit:

The State of Missouri, at the information of John M. Dalton, Attorney General, State of Missouri, at the relation of Richard E. Holekamp; Richard E. Holekamp, Marie H. Holekamp and Harrison L. Winters, Partners of R. E. Holekamp & Company, a partnership; Louis R. Holekamp, Louis R. Holekamp and Marianna Holekamp, his wife, Richard E. Holekamp, Jr.; Edward Alfred Holekamp; Jennie H. Burst; Edith H. Drosten; John Henry Holekamp and Malcolm Lee Holekamp, Appellants.

vs.

Holekamp Lumber Company, a corporation; Carl H. Holekamp, Sr.; Carl H. Holekamp, Jr.; Robert L. Broderick; Rose Marie Broderick; Nancy L. Gordon and Alice Ruth Kings, Respondents.

Appeal From the Circuit Court of St. Louis County.

Now at this day come again the parties aforesaid, by their respective attorneys, and the Court here being now sufficiently advised of and concerning the premises, doth consider and adjudge that the judgment aforesaid, in form aforesaid, by the said Circuit Court of St. Louis

County rendered, be in all things affirmed, and stand in full force and effect; and that the said respondents recover against the said appellants their costs and charges herein expended and have therefor execution.

In the Supreme Court of Missouri
Court En Banc.

September Session, 1960.

State ex inf. John M. Dalton, Attorney General, ex rel. Richard E. Holekamp et al.,

Appellants,

vs.

Holekamp Lumber Co., a Corp., et al.,

Respondents.

No. 48,171.

Appeal From the Circuit Court of the County of St. Louis.

Honorable Noah Weinstein, Judge.

Quo warranto to oust Holekamp Lumber Company (hereinafter called Holekamp) and individual respondents, majority stockholders, from carrying on the functions of a corporation of this state. Motions to dismiss were sustained and relators have appealed.

The motions to dismiss raised questions of proper parties and as to whether the information stated facts upon which relief could be granted. Because of the view we take we consider only the latter. The decisive question on this issue is whether the duration of a corporation, incorporated in 1908, could be extended by a majority vote only (authorized by our present Corporation Code, Chapter 351, R. S. Mo. or whether action by three-fourths

vote to accept subsequent laws (as provided in Sec. 972, R. S. 1899) was required. Because of the general importance of this question we transferred this cause from the St. Louis Court of Appeals. For further details of pleadings, reference is made to the opinion of the Court of Appeals, State ex inf. Dalton v. Holekamp Lumber Co., 331 S. W. 2d 171; and reference is also made thereto for a full statement of the contentions of relators and the full text of statutes considered.

The challenged extension of the period of duration of Holekamp was made by amendment of its articles under authority of Sec. 351.085 (statutory references are to R. S. Mo. and V. A. M. S. unless otherwise stated) for which Sec. 351.090 required only a majority vote. These sections are part of "The General and Business Corporation Law of Missouri," Chapter 351, adopted in 1943 (Laws 1943, p. 410), which is made applicable by Sec. 351.690 (4) "to all other corporations, existing under prior general laws of this state" excepting certain kinds specifically mentioned in preceding subsections, not material here. Relators' basic contention is that extension of Holekamp's duration could only be made under the procedure provided by Sec. 972, R. S. 1899, which was in force when Holekamp was incorporated and which they claim required a three-fourths vote for this purpose. They contend the statutes enacted in 1943 could not apply because they claim the Constitution of Missouri in force at that time (Constitution of 1875) reserved no general power to amend any corporate charter, nor was there any such statutory reservation, relying on Trustees of Dartmouth College v. Woodward, 4 Wheat. 518, 4 L. Ed. 629. However, we do not agree with relators' claim that this State had reserved no such power under its 1875 Constitution as to corporations authorized to be incorporated under its general laws; and for the reasons hereinafter stated hold valid the extension made under authority of Secs. 351.085 and 351.090.

Prior to our 1865 Constitution, corporations were usually created by special act of the Legislature, although there were prior general laws authorizing certain kinds of corporations to be incorporated by signing, acknowledging and filing articles. (R. S. 1855, Chapters 34, 35, 36, 37, 38, 39.) Our 1865 Constitution, Art. 8, Sec. 4, provided: "Corporations may be formed under general laws, but shall not be created by special acts, except for municipal purposes. All general laws, and special acts passed pursuant to this section may be altered, amended or repealed." Pursuant to that constitutional provision, a comprehensive general corporation act was passed by the Legislature in 1866 (Laws 1865-66, pp. 20-70). This act consisted of one chapter on general powers and liabilities and eight other chapters, each dealing with different kinds of corporations, and many of its provisions remained in effect until the adoption of our 1943 Corporation Act.

It should be noted that the 1865 Constitution did not prohibit the amendment, by special act, of special charters previously granted to corporations. (State ex rel. Circuit Attorney of the Tenth Judicial Circuit v. Cape Girardeau and S. L. R. Co., 48 Mo. 468; State ex rel. Ranney, v. Thileneus, 48 Mo. 479; St. Joseph & I. R. Co. v. Shambaugh, 106 Mo. 557, 569, 17 S. W. 581.) However, this power was taken away by the 1875 Constitution. Moreover, Sec. 4, Art. 8, of the 1865 Constitution stated the matter affirmatively, namely: "Corporations may be formed under general laws" and "all general laws and special acts * * * may be altered, amended and repealed," while the 1875 Constitution stated the whole matter in negative form. Sec. 2, Art. 12, thereof, was as follows: **"No corporation, after the adoption of this Constitution, shall be created by special laws; nor shall any existing charter be extended, changed or amended by special laws, except those for charitable, penal or reformatory purposes, which are under the patronage and control of the State."** Cer-

tainly this negatively stated provision of the 1875 Constitution did not mean that no corporation could be created by general laws. (See State ex rel. Walker v. Corkins, 123 Mo. 56, 63, 27 S. W. 363, stating this meant that corporations "must be created under the general laws of the state, and can have no valid existence unless authorized by general law.") **Our conclusion is that both provisions meant not only that corporations may be formed under general laws but also that the 1875 provision meant general laws authorizing corporations to be formed may be repealed, changed or amended by general laws.** (The question of such **meaning by implication** was suggested by Judge Pearcy in his work on Missouri Corporation Law, Sec. 175.) This is true because general laws concerning corporate powers are a part of all corporate charters.

This construction appears more clearly when we consider Art. 4 of the 1875 Constitution. Sec. 1 of Art. 4 provided: "The legislative power, subject to the limitations herein contained, shall be vested in a Senate and House of Representatives, to be styled 'The General Assembly of the State of Missouri.'" It is a well settled principle of constitutional law that our state constitution "is not a grant but a restriction or limitation on the legislative powers; therefore the General Assembly has all legislative powers not denied it by the Constitution." (State ex rel. Jones v. Atterbury, Mo. Sup., 300 S. W. 2d 806, 810.) One of the limitations provided by Sec. 53, Art. 4, was: "The General Assembly shall not pass any local or special law * * * 25. Creating corporations, or amending, renewing, extending or explaining the charter thereof." Sec. 53 further provided that "where a general law can be made applicable, no local or special law shall be enacted"; and made the applicability of a general law "a judicial question." **We, therefore, hold that the 1875 Constitution did contain a sufficient reservation to permit our Legislature to adopt general laws authoriz-**

**ing amendments to articles of incorporation of existing corporations, organized under general laws, to be made by a majority vote of their shareholders.** Of course, since we had never before construed these provisions of the 1875 Constitution to determine the question of such reserved power, the St. Louis Court of Appeals could not have decided the case on this ground because the limitation of its jurisdiction by Sec. 3, Art. 5, Const., prevented it from making any construction of the Constitution.

**Nevertheless, even with such a reservation of power, the authority of the Legislature to amend corporate charters or to authorize stockholders to do so is not absolute. Determination of the extent of this authority "requires consideration of three constitutional doctrines: police power, due process and obligation of contracts."** (Extent of the Legislature's Reserve Power to Change Common Law Attributes of Corporations, Hayes, 13 Vanderbilt Law Review 261.) It is said: "The charter of a corporation having a capital stock is a contract between three parties, and forms the basis of three distinct contracts. The charter is a contract between the state and the corporation; second, it is a contract between the corporation and the stockholders; third, it is a contract between the stockholders and the state." (Cook on Corporations, Sec. 492.) The third is also described as a contract of the stockholders inter sese. It is pointed out (13 Vanderbilt Law Review 275) that three principal approaches have been made by the courts in deciding what changes may be made with legislative sanction. "One is that under its reserved power the legislature may not make or authorize a majority to make any changes that will affect the contract between the shareholders themselves (unless perhaps as to matters where public interest overrides) but may change or authorize changes only in the contract between the state and the corporation. * * * **A second approach is that the legislature may make or**

**permit a majority of the stockholders to make any changes except those which will deprive a stockholder of some vested right.** * * * The third approach is that the reserved power of the legislature is part of the tripartite contract between state, corporation and shareholders, and therefore the state or a majority of the shareholders when authorized by the state may make any change as to corporate attributes without impairing any obligation of any aspect of that contract." (See also Constitutional Limitations Upon Legislative Power to Alter Incidents of the Shareholder's Status in Private Corporations, Schmidt, 21 S. Louis Law Review 12.) Sec. 351.695 of our Corporation Code enacts the vested rights principle and of course the purpose of this is to satisfy the requirements of due process. (See Ballentine on Corporations, Chapter 18; see also Dissenting Stockholders and Amendments to Corporate Charters, Dodd, 75 Univ. of Penn. Law Review 723.) The right to exercise the police power of the State was declared by Sec. 5, Art. 12 of the 1875 Constitution.

Relators point out that Holekamp's articles stated: "Article Sixth: The corporation shall continue for a period of fifty years." They say this was an agreement that the corporate life would cease March 10, 1958, and gave them a vested right to have their equity in the corporation distributed to them at that time, subject only to action by three-fourths of the stockholders under Sec. 972, R. S. 1899. Relators would have a better argument, if as suggested in Smith v. Eastwood Wire Mfg. Co., N. J., 43 Atl. 567, 568, the stockholders of Holekamp had, in its articles, excluded the power of continuing its corporate existence beyond a fixed period. However, they merely stated its existence as the longest period permitted by the applicable statute (Sec. 1312, R. S. 1899) at the time of its incorporation. As stated in the Smith case (43 Atl. l. c. 568): "The period of corporate existence is a matter which prima facie concerns the state only, and the limita-

tion to a definite period is an exercise of control in the interest of the public." (See also Drew v. Beckwith, Quinn & Co., Wyo., 114 Pac. 2d 98, 115 Pac. 2d 651; Keetch v. Cordner, 90 Utah 423, 62 Pac. 2d 273, 108 A. L. R. 52, and Annotation 59-77; 19 Am. Jur. 228, Sec. 85, 18 C. J. S. 470, Sec. 79; 8 Fletcher, Cyclopedia of the Law of Corporations 553-568, Secs. 4092-4109.) **We agree with the statement in the Drew case (114 Pac. 2d l. c. 107) that merely extending the existence of a corporation for another period of the same duration as stated in its original articles does not make a change "so fundamental that it should be declared in violation of the constitution relating to impairment of the contract of the stockholders."** (See also Garzo v. Maid of the Mist Steamboat Co., 303 N. Y. 516, 104 N. E. 2d 882.) Certainly authorizing an extension of corporate existence does not effect a substantial impairment of the purpose for which the corporation was organized; it does not drag these stockholders into a totally different enterprise from the one in which they intended to invest nor confiscate any of their property. **We therefore hold that the stockholders of Holekamp had no vested right to have its existence terminated and its assets distributed in 1958.**

Sec. 972, R&S. 1899, on which relators rely, had a double purpose. One purpose was to bring existing corporations, organized under special acts, under the general laws concerning corporations, by their voluntary action, including their surrender of all special privileges, immunities, franchises and exemptions, which perhaps was the reason for requiring a three-fourths vote. The other purpose was to collect fees for the privilege of extending corporate existence and this was undoubtedly the reason corporations organized under general laws were included in its terms. This section was the result of an amendment in 1885 (Laws 1885, p. 80) to the previous section vesting all corporations with certain powers enumerated in a pre-

ceding section, both of which sections originally were enacted when all corporations were created by special act of the Legislature. (See Chapt. 34, Art. 1, Secs. 1 and 2, R. S. 1845.) In 1881 (Laws 1881, p. 72) a new statute was enacted, which became Sec. 958, R. S. 1899, authorizing amendments to articles of corporations organized under the laws of this state with the limitation that such authority "shall not be so construed as to give any corporation whose articles are amended as in this article contemplated, any greater rights than though the subject of the amendments had been incorporated into the original articles of association." In State ex rel. Kinloch Telephone Co. v. Roach, 269 Mo. 437, 190 S. W. 862, without deciding what kind of amendments this section authorized, or by what proportion of stockholders, we held it in pari materia with Sec. 972 so that the two sections should "be construed as if their provisions were embraced in the same section." By this construction it was held that corporations organized under general laws had to pay the tax required by Sec. 972 to make effective a charter amendment extending its existence for a further period of thirty years. Likewise, in State ex rel. and to Use of George B. Peck Co. v. Brown, 340 Mo. 1189, 105 S. W. 2d 909, we held that our 1931 act (Laws 1931, p. 297), authorizing corporate existence to be extended by amendment "to any stated period or perpetual," must be construed with Sec. 4556, R. S. 1929 (which was Sec. 972, R. S. 1899); and we ruled that the tax required by that section must be paid before extension authorized by the 1931 act could become effective.

Sec. 972 (then Sec. 5031, R. S. 1939) was repealed by the 1943 Corporation Act (Laws 1943, p. 410, Sec. A) **and as hereinabove stated the 1943 Corporation Act made all existing corporations organized under general law subject to its provisions. Hicks v. Forsyth Electric & Water Co., 330 Mo. 839, 50 S. W. 2d 1045, cited by relators,**

held a statute prospective in operation, stating that such construction was required "if the act changes or alters in any respect the rights arising from the implied contract between a corporation and its stockholders, or between the stockholders intersese." However, the statute in that case did not specifically state that it applied to existing corporations, as did the 1943 Corporation Act, and furthermore in making no distinction between fundamental and less important changes which are only auxiliary, incidental, or supplemental, the court's statement was too broad. (As to fundamental changes see 13 Fletcher-Corporations 89, Sec. 5776; see also Tanner v. Lindell Railway Co., 180 Mo. 1, 79 S. W. 155.) However, the Hicks case is not controlling in the situation presented herein since we have concluded that there was reserved power in the 1875 Constitution to permit the Legislature to provide, in general laws, authorization for amendments to corporate articles of existing corporations by shareholders (an issue not considered in the Hicks case) and have decided that minority stockholders did not have a vested right to require termination of corporate existence merely because the articles stated a definite term. We, therefore, hold that the court properly sustained the motion to dismiss for failure to state facts upon which relief could be granted.

The judgment is affirmed.

Laurance M. Hyde, Chief Justice.

## Opinion.

(Reported at 331 S. W. 2d 171.)

(Filed January 19, 1960.)

In the St. Louis Court of Appeals.

January Session, 1960.

The State of Missouri, at the information of John M. Dalton, Attorney General, State of Missouri, at the relation of Richard E. Holekamp; Richard E. Holekamp, Marie H. Holekamp and Harrison L. Winter, Partners of R. E. Holekamp & Company, a partnership; Louis R. Holekamp, Louis R. Holekamp and Marianna Holekamp, his wife; Richard E. Holekamp, Jr.; Edward Alfred Holekamp; Jennie H. Burst; Edith H. Drosten; John Henry Holekamp and Malcolm Lee Holekamp, (Relators) Appellants,

vs.

Holekamp Lumber Company, a corporation; Carl H. Holekamp, Sr., Carl H. Holekamp, Jr., Robert L. Broderick, Rose Marie Broderick, Nancy L. Gordon, and Alice Ruth King, (Defendants) Respondents.

No. 30,388.

Opinion Filed January 19, 1960, as Modified January 25, 1960.

Appeal from the Circuit Court, St. Louis County.

Hon. Noah Weinstein, Judge.

This is a quo warranto proceeding and comes to us upon transfer from the Supreme Court. The relators are the

holders and registered owners of 315 shares (42%) of the issued and outstanding stock of Holekamp Lumber Company; and the respondents are the individual holders and registered owners of 435 shares (58%) of the issued and outstanding stock of said company, and the Holekamp Lumber Company, a corporation organized and existing under the laws of the state, having been incorporated on the 10th day of March, 1908. Pursuant to its original articles of agreement, the corporate existence of the respondent company would have expired on March 9, 1958. On December 3, 1957, respondents called a special meeting of the stockholders of the respondent company and voted, over objection of relators, to amend the articles of incor-



poration to extend the existence of the corporation for a period of fifty years from December 3, 1957. This special meeting was called pursuant to a resolution of the board of directors adopted at a special meeting of the board on November 20, 1957. Respondent directors Carl H. Holekamp, Sr., and Carl H. Holekamp, Jr., voted in favor of the resolution, and relator director Richard E. Holekamp voted against it. At the December 3, 1957, stockholders' meeting, the vote on extension of the corporate existence was 435 shares or 58% of the issued and outstanding stock for the extension, and 290 shares or 38.7% against it; 25 shares or 3.3% of the issued and outstanding stock did not vote, the holder thereof, Richard E. Holekamp, Jr., being absent from that meeting. The corporation respondent then filed its Certificate of Amendment to the articles of agreement with the Secretary of State, and a certified copy thereof was recorded in the Recorder of Deeds' office in the County of St. Louis on December 4, 1957. The procedures followed in this amendment of the articles of agreement were in accordance with the statutes of this state in effect on December 3, 1957, being Sec. 351.090, R. S. Mo. 1949, V. A. M. S.

On June 4, 1958, the information was filed. The individual respondents filed a timely motion to dismiss, contending that they were not proper parties to the action since it attacked the activities of the corporation and the corporation's existence was admitted. All of the respondents, corporate and individual, filed a timely motion to dismiss on the grounds that the information failed to state a claim upon which relief could be granted and also that the relators did not have the kind of special interest which entitled them to bring quo warranto. The trial court sustained both motions to dismiss, and relators' appeal is from that order.

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We will first discuss the relators' assignment of error based upon the action of the trial court in sustaining the motion filed by all the respondents, corporate and individual, upon the ground that relators' information failed to state a claim upon which relief could be granted. For such purpose we are to consider the allegations of the information as true. State at inf. of Dalton ex rel. Tucker v. Mattingly, Mo. App., 275 S. W. 2d 34.

Relators contend that the amendment of the corporate charter extending the life of respondent corporation for fifty years from December 3, 1957 is void because the original grant of the corporate charter constituted a contract between the state, the incorporators, and the corporation; that the terms of the contract are the articles of incorporation, the statutes at the date of the incorporation, and the Constitutions of this State and of the United States; that while the legislature of this state has inherent power to change its statutes, it can only do so subject to the provisions of the Constitutions of this State and of the United States; that there must also be read into the company's charter Article I, Section 13, Constitution of Missouri, 1945, prohibiting any law impairing the obligation of

contracts and or ex post facto law, and Article I, Section 10 of the United States Constitution which is the corresponding section of that document. Relators' position is that as of the date of incorporation all stockholders became possessed of a vested right to have the corporate life cease on March 9, 1958. Relators contend that respondents cannot proceed, therefore, to amend the articles to extend the corporate life by a majority vote as provided by Sec. 351.085, R. S. Mo. 1949, V. A. M. S., because the legislature never intended the 1943 statutes to apply to any vested right or contract provision such as the extension of the corporate life, but was only



meant to apply to regulatory, fee, or police power provisions, and that the automatic application of the 1943 Act as provided by Sec. 351.690, supra, is limited by its terms to these police or regulatory powers inherent in the state. Section 351.085, 2, (2), supra, provides.

> "2. In particular, and without limitation upon such general power of amendment, a corporation may amend its articles of incorporation from time to time so as . . . (2) To change its period of duration; . . ."

Section 351.690 is in four parts. Subparagraph 1 provides that the provisions of the 1943 Act relating to fees, police powers of the state and general regulatory provisions shall apply to all existing corporations. Subparagraphs 2 and 3 are concerned with certain corporations not here involved. Subparagraph 4 provides that the provisions of the 1943 Act, to the extent therein provided, shall apply to all other corporations existing under prior general laws of the state and not specifically mentioned in subparagraphs 1, 2 and 3. Section 351.090, supra, provides by subparagraph 3 that proposed amendments may be adopted by a majority vote (we are not here concerned

with the situation covered by (a) of subparagraph (3). Relators urge that the intention of the legislature and that body's awareness of the constitutional problems under Article I, Sec. 13, 1945 Constitution of Missouri, and Article I, Sec. 10, Constitution of the United States, that would arise by the application of Sec. 351.085 to all the provisions of articles of incorporation is illustrated by the legislative enactment of the provisions of Section 351.695, R. S. Mo. 1949, V. A. M. S. The provisions of that section are:

> "All rights, privileges, immunities and franchises vested or accrued under the provisions of any law in force prior to the enactment of this chapter, and all pending suits and rights of action conferred shall not be impaired, diminished or affected hereby, or by the repeal of any such prior laws. Any liability or penalty incurred under prior laws prior to the repeal thereof shall not be impaired, diminished or affected hereby. All acts and laws not expressly repealed hereby shall continue in full force and effect. (L. 1943, p. 410, Sec. 174)."

– 4 –

Relators' contention is that either (1) their alleged right of termination is saved by Sec. 351.695, supra, or (2) Sections 351.085, 2 (2), 351.090 (3), and 351.690 (4) of the 1943 Act are unconstitutional. Of course, the taking of such alternative positions resulted in the transfer of the case from the Supreme Court to us.

Relators also contend that since respondents cannot proceed under the provisions of the statutes above set out to amend by a majority vote for the reason that those statutes are not applicable to the respondent corporation automatically, and since it is admitted that there was never a vote of the respondent corporation's shareholders to ac-

cept the provisions of any subsequent statutes, respondents can only amend as they have attempted if such procedure was authorized under the corporation laws in force when the respondent corporation was formed. They urge that the stockholders, being those to whom the incorporators' rights descend, have only those powers granted in the contract, and can change or vary the contract only in the manner and to the extent authorized by the contract. Their argument is that the 1899 corporation laws must therefore be read into the articles of incorporation. Section 972, R. S. Mo., 1899, reads:

> "The powers enumerated in the preceding section shall vest in every corporation that shall hereafter be created or organized, and any corporation, including those heretofore organized and now in existence under any general or special laws of this state, may accept the provisions of the general laws of this state relating to corporations, by filing with the secretary of state a certificate of such acceptance, signed by its president and secretary, duly authorized by its board of directors and approved by a vote of three-fourths of its stockholders, at any meeting duly and legally called for that purpose—notice of such meeting first having been given in manner and form as provided in Sections 962 and 963 of this article, or by three-fourths of the stockholders, in writing; and upon the filing of such certificate, the time of the existence of said corporation shall be extended for such period as was originally permissible to it, or as may be stated in



> its certificate of acceptance. But nothing herein contained shall extend or continue to any corporation organized or existing under a special law or charter any special privilege, immunity, franchises or exemp-

tions not possessed by corporations organized under the general laws of this state; and any corporation organized or existing under special law or charter shall, by accepting or availing itself of the provisions of this section, be deemed and held to thereby waive and surrender any and all such special privileges, immunities, franchises and exemptions, and it shall be subject to all the duties and obligations of corporations under the general laws of this state; **Provided, further**, that the duration of such corporation shall not be continued as aforesaid, until such corporation shall pay into the state treasury fifty dollars for the first fifty thousand or less of the capital stock of the corporation, and a further sum of five dollars for every additional ten thousand dollars of its capital stock, as provided by law; **provided**, that nothing in this section contained shall be construed to authorize the renewal, continuance or extension of the charter of any company engaged in the manufacture or sale of illuminating gas."

Section 958, R. S. Mo. 1899, reads as follows:

"All amendments to articles of association of corporations organized under the laws of this state, made and filed in the office of the secretary of state, are and shall be and become a part of the articles of association of the corporation adopting and filing the same; and this section shall not be so construed as to give any corporation whose articles are amended as in this article contemplated, any greater rights than though the subject of the amendments had been incorporated into the original articles of association; and any corporation, company or association which may increase its capital stock under the provisions of this article shall pay the additional amount provided by law for such increase."

Respondents contend that in State ex rel. Kinloch Telephone Company vs. Roach, 269 Mo. 437, 190 S. W. 862 (1916), Sections 958, supra, and 972, supra, were reconciled and construed. If there was no new law to accept, the corporation could dispense with the first step and extend its life under Section 958, supra, and pay the tax under Section 972, supra, and thus would only need a simple majority



to extend its life in this fashion. The three-fourths vote was only required where some new law was accepted and not to the extension of the corporation. It follows, respondents urge, that the right to extend by a simple majority did exist when the respondent corporation was organized and the alleged right of relators never was a vested right.

On the other hand, respondents contend that even if we assume that prior to the 1943 Corporation Code it required three-fourths vote to extend the life of a corporation, nevertheless extension was possible and the only question is as to the mechanics of effecting such extension and the change, if any, in such mechanics. In this connection they urge that no reserve power was needed to permit an amendment of the corporation code permitting an extension of the corporate existence, and rely principally on Drew vs. Beckwith, Quinn & Co., 57 Wyo. 140, 114 Pac. 2d 98; 115 Pac. 2d 651.

The parties agree as to this point—the case is a case of first impression in Missouri.

With the contention of respondent that no reserve power was needed for an amendment permitting an extension of corporate existence, we cannot agree. The real beginning of the law in respect to the question here raised is not the case of Dartmouth College v. Woodward, 4 Wheat. 518,

4 L. Ed. 629, as usually thought, but is found in Fletcher v. Peck, 6 Cranch. 87, 3 L. Ed. 162. The Dartmouth case extended the doctrine of Fletcher v. Peck, supra, and the cases that preceded it, and held that the constitutional provision against the impairment of contracts applied not only to contracts between individuals, and to grants of property made by the state to individuals or to corporations, to which it had previously been held to apply, but that it also applied



to the rights and franchises conferred upon private corporations by legislative acts under which their existence was authorized, and that the rights to exercise the functions conferred upon them by the statute were, when accepted by the incorporators, contracts which the state could not impair, being within the meaning of the constitutional clause (Art. I, Sec. 10, United States Constitution) preventing the impairment of the obligation of contract by subsequent state legislation. Fletcher, Cyclopedia of Corporations, Vol. 7, Chap. 43, Sec. 3658. Despite criticism of the decision at that time and which continues even today, the rule of that case has become an accepted and universally recognized part of our judicial doctrine. It soon became obvious that the Dartmouth College decision extended undue protection to corporations. The excesses that became synonymous with the grant of corporate charters created a demand for modification of that decision. The first modification adopted by the courts was the principle of strict construction. Charles River Bridge Co. v. Warren Bridge Co., 11 Pet. 420. The second attempt to limit the Dartmouth College case was that the states, seizing upon a suggestion made by Mr. Justice Story in his concurring opinion in the Dartmouth College case, inserted provisions in their constitutions and/or in their statutes, reserving the power to repeal or amend any

charters granted. In Greenwood v. Freight Co., 105 U. S. 13, and in Covington v. Kentucky, 173 U. S. 231, constitutional or statutory limitations on corporate charters were held valid upon a refinement of the Dartmouth doctrine itself; i. e., the limitations in the constitution or in the statutes became a part of the obligation of the contract in every charter.

While the Constitution of 1820 was silent upon the matter, the Constitution of Missouri, 1865, Article VIII, Sec. 4, prohibited the creation of private corporations by special acts and specifically



reserved the power to repeal, amend, or alter. For some reason, the Constitution of Missouri, 1875, Article XII, Section 2, while continuing the provision against the creation of private corporations by special acts, dropped the reservation of powers found in the 1865 Constitution. There was no constitutional provision reserving power to the legislature in effect when the respondent corporation was organized.

Was there a statutory reservation? So far as the early statutes of this state are concerned, there was no set pattern or rule followed by the legislature in granting special charters. When charters were granted by special act of the legislature prior to that time, there sometimes was, and on other occasions was not, a specific reservation of power to the state government contained in the act granting the charter. Of course, the act was the charter itself. The first general corporation code of this state, the Act of March 19, 1845, contained a specific statement on reservation of power. That act provided in Chapter 34, Article I, Section 7, p. 232: "The charter of every corporation that shall hereafter be granted by the legislature shall be subject to alteration, suspension and repeal, in the discre-

tion of the legislature." This section also appears in Revised Statutes of 1855, Chapter 34, Sec. 7, p. 371, but it does not appear in the Revised Statutes of 1865. Undoubtedly it was felt that since there was a specific reservation of power to alter, repeal or amend contained in the Constitution of 1865, this statutory reservation was duplication and was not necessary. This provision does not appear in the statutes after that date, and there was no statutory reservation of power to alter, amend or repeal until the passage of the 1943 Corporation Code. See Sec. 351.700, R. S. Mo. 1949, V. A. M. S. It follows there was no statutory reservation of power in the legislature to alter, amend or repeal any corporate charter at



the time of the organization of the respondent corporation.

The authorities cited by respondents do not bear out their contention that a reserved power was not needed in order for the legislature to make the provisions of the 1943 Corporation Code and any other act passed subsequent to the date of the incorporation of respondent corporation applicable to respondent corporation.

A careful reading of Smith v. Eastwood Wire Mfg. Co., 58 N. J. Eq. 331, 43 A. 567, discloses that the case was one where a specific statutory act authorized extension of the corporate life. The corporation was organized in 1880 and its existence fixed at twenty years. Under the Corporation Act of New Jersey then in force (Act of 1875, Sec. 11) the maximum period of corporate existence was fifty years and by Act of 1876 it was provided that the corporation could extend for any period not exceeding fifty years. This is a case where the extension was specifically provided for by a statute in existence at the time of incorporation. See General Investment Co. v. American Hide

& Leather Co., 97 N. J. Eq., l. c. 223, 127 A. 529, where the decision is so interpreted. As one could naturally suppose from the language of the court at the bottom of the second column on p. 568 where it is said ". . . or under subsequent laws, by which the state, as it has a right to do, in its control over corporations . . .", there was a specific statutory reservation of power in the Act of 1875, Article I, Sec. VII, 6, p. 178, R. S. of N. J., 1709-1877, in force at the time of the corporation's organization.

Respondents cite Hueftle v. Farmers Elevator, 145 Neb. 424, 16 N. W. 2d 855, decided by the Supreme Court, of Nebraska. This is an-



other case where the question was one not involved here. At p. 858 of the Northwestern report of that case, the court specifically recognized that ". . . the right to amend the articles and by-laws was reserved at the time plaintiffs became stockholders . . ." and goes on to hold that amendments even under a reserved power cannot impair vested or contractual rights of minority stockholders. The case was decided upon the question of the extent of the reserved power, and is not authority in the case at bar.

As appellant points out, Drew v. Beckwith, supra, was a case of reserved power. At l. c. 103, supra, the court points out and relies upon Article 10, Section 1, of the 1890 Constitution of Wyoming which contains a specific reservation of power to alter, amend, or repeal. Moreover, earlier on that same page the court cites Sec. 518, R. S. Wyo. 1887, which was a statutory reservation of power. Both the constitutional and the statutory reservation of power were in effect when the corporation therein concerned was organized. Actually, the Drew case is one on the question of the limitation of the reserved power. As the court said at l. c. 104:

"However, it is generally agreed that the reserved power is not unlimited in its scope. Phillips Petroleum Corp. v. Jenkins, 297 U. S. 629, 56 S. Ct. 611, 80 L. Ed. 942; 13 Am. Jur. 237; Fletcher, supra, Sec. 3684. Hence the only valid argument herein is upon the question as to whether the extent to which the contract was changed, or rather was authorized to be changed, was justified. If there had been in existence at the time of the organization of the corporation a law which specifically authorized the extension of corporate life, then that law would have been a part of the contract, and such extension would have been lawful. McKemie v. Grocery Co., 146 Ga. 753, 92 S. E. 282; Smith v. Eastwood Wire Mfg. Co., 58 N. J. Eq. 331, 43 A. 567; Keetch v. Cordner, 90 Utah 423, 62 P. 2d 273, 108 A. L. R. 52; Loeffler v. Federal Supply Co., 187 Okl. 373, 102 P. 2d 862. **But there was no such statute and the question is whether the reserved power under**



**the constitution and statute already mentioned is sufficiently broad and comprehensive for that purpose.**" (Emphasis supplied.)

Insofar as the case of Keetch v. Cordner, supra, is concerned, suffice it to say that while the court does not so indicate in its opinion, a search of the earlier laws of Utah will disclose that Section 549 of the Laws of 1876 was in effect when the corporations therein concerned were organized. That section reserved power to modify or repeal to the governor and legislature of the Territory of Utah. That section was in the general corporation laws. So it is with the other cases cited by respondent and those cited by the court in the Beckwith case; they are all cases where the state had a reserved power and where the court relied, to some extent at least, upon the existence of that power in making its decision.

Neither do we understand Pearcy, Missouri Corporation Law, Sec. 175, p. 654, cited by respondent, to be authority for the contention of respondent that this state has a reserved power in its constitution by implication inferred from the passage of acts requiring incorporation only by general laws. All that author does is to pose the question and then say, "The Missouri Supreme Court has not yet said so." If this is authority, it is so nebulous we cannot grant it weight, especially since that writer goes on to point out that the Supreme Court, in Hicks v. Forsyth Electric & Water Co., 330 Mo. 839, 50 S. W. 2d 1045, had an excellent opportunity to say so and did not. At l. c. 1047 of the Southwestern Reporter, the court said:

> "If the act changes or alters in any respect the rights arising from the implied contract between a corporation and its stockholders, or between the stockholders inter sese, as they have heretofore existed, it must, **under well known rules of construction,** be held to be prospective only in its operation. Cranor v. School Dist., 151 Mo. 119, 52 S. W. 232; Supreme Council of Royal Arcanum v.



> "Heitzman, 140 Mo. App. 165, 120 S. W. 628. **If, therefore, it was intended to effect a change in the contract rights just mentioned, it is without application to those existing at the time it became law.**" (Emphasis supplied.)

It was held prospective because to hold it retrospective would have rendered it unconstitutional and void, and under well known rules of construction, when an act is susceptible of two interpretations, one of which will render it unconstitutional, every possible weight shall be accorded the constitutional construction. See the Cranor and Heitzman cases cited in the excerpt set out above and earlier

cases cited therein. Also see State v. Missouri Pacific Railway Co., 262 Mo. 720, 174 S. W. 73. The case of Hicks v. Forsyth Electric & Water Co., supra, is a clear indication that, so far as the theory of subsequent amendments applying to earlier corporations, the result would be the opposite of the position for which respondent cites Pearcy, supra.

Respondent contends that what has been said herein regarding reserved power and the doctrine of the Dartmouth College case is not applicable when the corporation was chartered under the general laws. We cannot agree. When this state had a reserved power, it was specifically held to apply to "* * * all subsequent charters whether granted by general law or special acts of the legislature," Gregg v. Granby Mining & Smelting Co., Nelson et al., 164 Mo., l. c. 628, 65 S. W. 312; see Fletcher, Cyclopedia of Corporations, supra, Sec. 3658, p. 795.

The doctrine of the Dartmouth College case remains inviolate. Absent a reserved power, it cannot be said that the incorporators impliedly agreed at the time they entered into the articles of incorporation to any change or amendment which the legislature might later make in the general corporation code (Pacific Railway v. Renshaw, 18 Mo. 210, l. c. 216), and the legislature could not interfere or change by



subsequent legislative acts the contract created upon the incorporation of respondent company.

In addition to the case of Hicks v. Forsyth Electric & Water Co., supra, the case of State ex rel. George B. Peck Co. v. Brown, 340 Mo. 1189, 105 S. W. 2d 909, Supreme Court en banc, 1937, is important. In that case relator was organized in 1889 for fifty years. Relator sought to amend to extend existence and sent amendment to respondent

Secretary of State but refused to pay the fees called for by Sec. 4556, R. S. Mo. 1929 (Mo. Stat. Ann. 4556, p. 2002), which was identical to Sec. 972 here involved. Relator contended that under an act of 1931 the legislature provided a method for extending its corporate existence and since that section, Mo. Stat. Ann. 4556a, p. 2003, said nothing of the payment of such fees, the relator could proceed to amend thereunder and not pay the fees required by Sec. 4556, supra (972). It was held that these two sections were not repugnant nor was the later act an amendment of the earlier statute. It was a new act and should be read with the other act. The court held at l. c. 912 of the report in 105 S. W. 2d that a corporation organized for a period of years may amend its charter so as to give it perpetual existence upon the payment of the fee provided for in Section 4556 (972). Without careful consideration, the case would seem strong authority for respondent at bar. However, it must be noted that the 1931 act provided for the same thing as the earlier section, three-fourths vote, and that was obviously obtained. In other words, the section with which we are here concerned, 972, was in force as Sec. 2509, R. S. Mo. 1889, when the Peck Company was organized. That section allows acceptance by three-fourths vote of subsequent laws, such as the 1931 act, and the three-fourths vote was given.



Both relators and respondents have cited Midland Truck Lines v. Atwood, 362 Mo. 397, 241 S. W. 2d 903. That case is actually strong authority for our decision herein. Section 972, supra, had become Section 5031, R. S. Mo. 1939, and was in effect when Midland Truck Lines was organized in 1935. The court held that since that section was in force when the corporation was organized, it became a part of its charter and the corporation could proceed to accept the subsequent general laws under it. It did

so, and adopted the general laws by three-fourths vote, and then amended its charter to issue the preferred stock authorized by legislative enactment made subsequent to incorporation. In the case at bar, the same reasoning would apply, except that respondent corporation did not proceed to accept the provisions of subsequent general laws. That part of the decision holding that the laws in effect when the vote under Sec. 5031, supra (972) to accept subsequent general laws was taken are those that thereafter apply, and not the laws in effect when the corporation was organized, is not on the point here involved.

State ex rel. Kinloch v. Roach, supra, cited by respondents, is a case that, without very careful reading, is compelling toward respondents' position. That case, on original writ for mandamus by the state at the relation of the Kinloch Telephone Company against the then Secretary of State, was decided by our Supreme Court en banc in November, 1916. The Kinloch Telephone Company had been organized in December, 1896, and its articles failed to state any term for its corporate existence. Therefore, the term of existence was conceded to be twenty years, the statute being the same as Sec. 971, supra. On June 22, 1916, the "board of directors and stockholders" adopted an amendment extending the existence for thirty years. The required preliminary steps were taken, but when the proposed amendment was presented to the Secretary



of State he refused to file and to certify it. The company was relying upon Sec. 2977, R. S. Mo. 1909, which is the same as Sec. 958, supra. Section 972, supra, had then become Sec. 2991, and Sec. 971, supra, had become Sec. 2990. The Secretary of State made two contentions. First, he denied that Sec. 2977 (958) covered amendment extending corporate existence, claiming that Sec. 2991 (972) was the only section providing for an extension of exist-

ence; and second, in any event, the Kinloch Telephone Company had to pay the tax prescribed in Sec. 2991 (972). The court pointed out that if, as Kinloch contended, Sec. 2991 (972) did not apply and if, as the Secretary of State contended, Sec. 2977 (958) was not applicable to such an amendment, then there was no statutory power given to corporations in Missouri to prolong their life. The court then said at l. c. 862 of the Southwestern report:

> "This power, however, **seems not to be seriously questioned**, and for a long number of years has been generally recognized and exercised, and **for the purpose of this case we shall treat it as existent.**" (Emphasis supplied.)

The court held that Sec. 2991 (972, supra) was applicable to corporations organized subsequent to its passage and under the general laws. We cannot agree with respondent's interpretation of the Kinloch case that the case authorizes extension of corporate life under Sec. 958. All that case did was to hold that the last part of Sec. 972, providing for the payment of fees, applies whenever a corporation extends its corporate life. The case is one where the vote was to adopt subsequent laws, as provided by Sec. 972, and is clearly distinguishable also on the ground that all shareholders agreed to so act. It is not controlling in the case at bar, the point in this case being assumed by the court in the Kinloch case for the purposes of that decision which was based on other grounds and was not seriously presented by the parties in the case.

— 16 —

In State ex rel. Equality Savings & Building Association v. Brown, 334 Mo. 781, 68 S. W. 2d 55, the court had before it an association organized in 1884 that, according to the petition, extended its corporate existence in 1897 "* * * in the manner provided by law * * *" for a period

of fifty years from and after 1884. Sometime shortly before expiration of that period, it unanimously voted to extend again. Relator contended that it only had to pay the $5.00 fee for such extension provided by the special act relating to building and loan associations and respondent contended that it had to pay the fees required by Section 972 which was then Sec. 4556, R. S. Mo. 1929. The court held that the provisions of the special act relating only to building and loan associations applied, pointing out that that act had been in effect since 1889. The respondent urged the Kinloch case, supra, as controlling, and compelling payment under Sec. 4556 (Sec. 972). The court said at l. c. 59 of the Southwestern report:

> "Respondent urges our decision in State ex rel. Kinloch Telephone Co. v. Roach, 269 Mo. 437, 190 S. W. 862, as supporting his contention that section 4556 is controlling. The Kinloch Case is not analogous to the instant case on the point in controversy because there was no statute dealing specially with extension of duration of telephone companies. The general statute, now section 4556, was the only one that definitely provided for such extension. In the instant case we have two statutes definitely dealing with the subject, one providing such extension for corporations in general, and one providing such extensions for building and loan associations in particular."

While dictum, it is certainly clear that the court regarded the Kinloch case in the same light as we have herein distinguished it as not ruling upon whether or not Section 958 allows amendments to extend corporate existence, and further, that the court regarded Sec. 972 as the only section allowing amendments to extend corporate existence.

— 17 —

The provisions of Sections 351.085 and 351.090 do not apply to respondent corporation, being prospective in

their application. We also hold that Section 351.690 does not apply to respondent corporation. To hold otherwise would be to render unconstitutional Sections 351.090, 351.690 and 351.085. When faced with such alternatives, our duty is clear. State ex inf. McKittrick v. American Colony Ins. Co. et al., 336 Mo. 406, 80 S. W. 2d 876, l. c. 883; Ellis v. State Department of Public Health and Welfare, Mo. App., 277 S. W. 2d 331.

Having above held that subsequent legislative acts cannot be automatically applied to respondent corporation, and since it is admitted that respondent corporation never accepted the subsequent legislative acts allowing the extension of corporate life nor ever submitted such a question to its shareholders, the motion to dismiss for failure to state a cause of action should have been overruled unless the statutes in force when respondent corporation was organized authorized or allowed such an amendment as is attempted here. Here, also, respondents must be denied, for these statutes do not permit amendments to extend the corporate life. It is not the lack of a certain percentage of shareholders agreeing to such amendment that prevents it, but the missing element is the total lack of any power in the corporation to extend under any vote.

Well known rules of statutory construction compel such a decision. This was a business corporation and was organized under that section of the Revised Statutes of 1899. Section 1312 of the Manufacturing and Business Corporation Law Limited corporate existence to fifty years for such corporations as respondent. (Prior to 1879, business corporations were limited to twenty years existence. Section 926, R. S. Mo. 1879, increased this period to fifty years, and it



remained at fifty years until 1927, when perpetual existence was provided for as to new corporations. See State

ex rel. H. D. Lee Company v. Bell, 355 Mo. 94, 195 S. W. 2d 492; State ex rel. George B. Peck Co. v. Brown, supra.) The provisions of the statutes of 1899 dealing with business corporations say nothing of amendments, and to determine what, if any, amendments are to be allowed, we must refer to Article I of Chapter 12 of the Revised Statutes, 1899, dealing with the general powers of private corporations. Section 958, supra, recognizes that there may be amendments, but it does not state what vote is required therefor, nor for what purposes such amendments could be made. It does restrict such amendments to no greater rights than though the subject of the amendments had been incorporated into the original articles of association. In the case at bar, the amendment was to extend the existence of the corporation for another fifty years, and as noted herein, this term was allowable under the statutes in force when the corporation was organized, and so the amendment does not violate that provision of Section 958. Section 972, supra, states clearly, "The powers enumerated in the preceding section shall vest in every corporation that shall hereafter be created or organized * * *" The preceding section, Section 971, Revised Statutes of 1899, defines corporate powers and lists seven subsections. The power to extend corporate life is not listed therein, nor is it listed at any place in the statutes in effect when respondent corporation was organized, nor is it such as to be incidentally necessary to the exercise of any of the powers expressly granted. Following the general rule, where the statute specified the powers of a corporation, such specification by implication excludes all other powers or rights except those as may be incidentally necessary to an exercise of the powers expressly granted. Prairie Slough Fishing & Hunting Club v. Kessler,



252 Mo. 424, 159 S. W. 1080; Doe Run Lead Co. v. Maynard, 283 Mo. 646, 223 S. W. 600. Under well-familiar

rules of construction, an act such as this must be read as a whole, and it follows that Section 958 can only have reference to the amendments that might be allowed under the corporate powers created by Section 971, or as a reasonable incident thereto. Doe Run Lead Co. v. Maynard, supra.

The very case most heavily relied upon by respondents clearly supports the decision herein. In the quotation from that case earlier in the opinion, the court in the case of Drew v. Beckwith, Quinn & Co., supra, stated that if there had been a statute in existence when the corporation was organized, specifically authorizing the extension of corporate life, that law would have been part of the contract and such extension would be lawful: a strong indication that the absence of such specific authorization makes the extension of corporate life unlawful. Of course, the court therein allowed such extension, but as earlier pointed out herein the question was one of whether or not the reserved power was sufficient to empower legislation subsequent to the incorporation for that purpose and to make such legislation effective as to the company. Without that reservation, the Drew case clearly indicates the path we are here treading. To that same effect is McKemie v. Eady-Baker Grocery Co., 146 Ga. 753, 92 S. E. 282; and Loeffler v. Federal Supply Co., 187 Okla. 373, 102 Pac. 2nd 862. In both of those cases there was present the element missing in the case at bar; i. e., statutory power to renew or extend. In the McKemie case, corporations by statute were expressly given the right to renew the charter at the end of twenty years. The court there said, at l. c. 283 of the opinion in 92 Southeastern Reporter:



"Paraphrasing the argument of the Supreme Court of the United States, we might say that it was con-

templated by the Legislature, as it must have been by all the subscribers to the stock of the company, that the corporation at the expiration of its charter might apply for and obtain a renewal of the corporate term, and that precisely that has occurred which might occur."

The case is further distinguishable on the ground that the majority opinion specifically states that the court is there dealing with a question of renewal of a charter and draws a careful distinction later on page 283 between that case and the case of an amendment to the charter. The dissent was on the basis that this was not a renewal, but an amendment. It is also clear that Article III, Section 7, paragraph 18 of the then constitution of that state constituted a reservation of power in the legislature. The same is true of the Loeffler case. There, also, the statutory provision for renewal was in full force and effect when the corporation there involved was originally incorporated. At l. c. 865 of the record in 102 Pacific 2nd, the court held that the incorporators were presumed to have entered into the corporation contract with full knowledge of the statute. The case is also distinguishable on the grounds of a renewal as compared to an extension. At l. c. 864, the court cites Fletcher's Cyclopedia of Corporations, Vol. 8, page 553, stating the distinction between a renewal and an extension. At l. c. 865, the court further points out the specific statutory reservation of power to the legislature which was in effect when the corporation was first formed, and relies thereon.

Stockard, Missouri Corporation Law, Chapter 25, Sec. 430, p. 214, states that the only statutory provision that can be construed to give a corporation a right to renew or extend its corporate existence beyond that first named in its charter is Sec. 972. (At the time that

authority was writing, the section was Sec. 9750, R. S. Mo. 1919. The provision was first enacted in 1885.) Sears on Missouri Corporations, p. 61, agrees and cites the case of Bradley v. Reppell, 133 Mo. 545, 32 S. W. 645. In that case, although it is concededly dictum since the corporation there involved was created by a special act of the legislature, and the case is otherwise distinguishable on the facts, the court, at page 552 of the official report, in reply to a contention that only the state was the proper authority to bring the action, states:

> "On the contrary, in this state, as elsewhere, **unless otherwise provided by statute**, the law is that where the term of the existence of a corporation is fixed by its charter **or the general law**, upon the expiration of that term the corporation becomes ipso facto dissolved; it can no longer act in a corporate capacity and its title to property ceases." (Citing authorities.) (Emphasis supplied.)

In the wording of Sec. 972, supra, the insertion of the clause "* * *; and upon the filing of such certificate, the time of the existence of said corporation shall be extended for such period as was originally permissible to it, or as may be stated in its certificate of acceptance * * *" refutes the contention that any other section of the then existing statutes such as Sec. 958, supra, were ever intended to be applicable to amendments extending corporate existence. The plain meaning of that language and the position in which it is placed in Section 972, supra, the punctuation preceding it and the fact that a new sentence containing a totally different thought begins after that clause, all compel it to be read in connection with the preceding matter requiring three-fourths vote of the shareholders. When this is considered in light of the failure of Sec. 971, supra, to give power to extend and the general nature of Sec. 958 which must relate only to the powers

granted under Sec. 971, supra, the conclusion that the legislature



intended Sec. 972, supra, to be the only method of extension and to require three-fourths vote of the shareholders to act thereunder to extend is inescapable.

The decision that the Revised Statutes of 1899 did not permit extension of a corporation's life is not only required by rules of statutory construction, and supported by case law and text authorities, but it is also based upon sound reason, for it carries out the very agreement of the incorporators. It is not difficult to assume many situations in which the length of the life of the corporation could be a matter of paramount importance to one considering an investment in that corporation. In any event, we do not think that we should now indulge in speculation as to whether or not the limit of corporate existence was of importance to the original incorporators. But the legislature did not leave corporations without any remedy. In 1883, the legislature first enacted what became Sec. 1008, R. S. Mo. 1899, in force when respondent corporation was organized. By the provisions of that section, when a charter of any corporation is about to expire by limitation of time, the stockholders or a majority in interest thereof may incorporate under the general laws of the state for the purpose of continuing the business of such expiring corporation. It is difficult to see why this section approved of a majority vote or would have been enacted by the legislature, except that the legislature considered it the only way to extend corporate life beyond the time limited in the articles of incorporation.

We hold that under the statutes in force when respondent corporation was organized, an amendment to extend

corporate life was not permissible for the reason that Section 958, supra, must be read in



connection with Section 971, supra, and the only amendments authorized under Section 958 are those with reference to the powers enumerated in Section 971. The power to extend the corporate life not being one of the powers enumerated in Section 971, supra, an amendment for that purpose is not authorized by Sec. 958, supra. We further hold that Sec. 972, supra, does not authorize an amendment to extend corporate life by a majority vote.

Respondents contend that relators have no right to bring quo warranto in this case as there is no allegation of public interest involved, but we find the question herein presented to be one in which the public as a whole is interested. State ex inf. McKittrick v. American Colony Insurance Co., supra. The case is clearly within the rule of State ex inf. Hadley, Attorney General, v. Standard Oil Co., 218 Mo. 1, 349, 116 S. W. 902, that the question would be whether the misuse or abuse consists in the exercise of a franchise power not conferred upon the corporation by its charter, or in violations of prohibitions of the corporate charter or of the general laws to which it is subject. This information was signed by the Attorney General of this state, but the relators have control of the action. State on inf. of McKittrick, Atty. Gen., ex rel. Haindlin v. Wilkie Land Co., 349 Mo. 666, 162 S. W. 2d 846.

It follows from what we have said that the respondent majority stockholders of Holekamp Lumber Company are without right and authority to amend that corporation's articles of incorporation by simple majority vote so as to extend the corporate life beyond that limited in the original articles, and therefore, the respondent corporation is

improperly and unlawfully exercising a corporate franchise of this state.

The trial court sustained the individual respondents' motion to dismiss as to them on the grounds that they were not proper parties, and relators assign that action as error.

24

In State on Information of McKittrick, Attorney General, ex rel. City of California v. Missouri Utilities Co., 339 Mo. 385, 96 S. W. 2d 607, the Supreme Court pointed out that the decision as to the proper parties depends upon what the writ is sought to correct, or upon what the information alleges as improper. At p. 613, supra, it said:

> "Where a writ of quo warranto, or an information in the nature thereof, is filed to test the existence of a corporation which, it is claimed, has never really been created by the state at all, the proper defendants are the natural persons asserting the right to act as a corporation. But where it is asserted that a corporation, recognized to legally exist, has overstepped its powers, it, and it alone, is the proper defendant in quo warranto."

The question here, then, is whether the information tests the existence of Holekamp Lumber Company, or whether it raises the question as to whether that corporation, recognized to legally exist, has overstepped its powers. It might be said that since the corporation under its previous charter was to come to an end on March 9, 1958, the writ in this case is to test the existence of the present corporation as extended by the vote of 58% of the issued and outstanding stock at the December 3, 1957 stockholders' meeting. However, since the information itself states that the respondent corporation is a corporation recognized and existing under the laws of this state, it may also be contended that relators are merely testing the usurping

of the corporation's powers, and not its legal existence. In the concluding paragraph thereof, the information prayed for the trial court to find and decree that respondents, and it lists all of them, corporate and individual, had no right or title to the franchise, rights and privileges of a corporation and that they be ousted and deprived from operating as and carrying on the functions of a corporation. While the language of the prayer



when read with the admission of the corporate existence may be confusing, we believe the clear intent of this information is to test the existence of the corporation. The individual respondents are proper parties for that purpose. Where the corporation is actually existing, and the amendment to the articles of agreement has been filed with the Secretary of State and the Recorder of Deeds of St. Louis County, both the corporation and the stockholders are proper parties. The motion to dismiss as to the individual respondents should have been overruled.

The commissioner recommends that the judgment be reversed and the cause remanded for further proceedings not inconsistent with the decision herein expressed.

Robert G. Brady,
Commissioner.

Per Curiam:

The foregoing opinion of Brady, C., is adopted as the opinion of the court. The judgment is, therefore, reversed and the cause remanded for further proceedings not inconsistent with the decision herein expressed. It is so ordered.

John J. Wolfe, Presiding Judge, Concurs.

Lyon Anderson, Judge, Concurs.

E. M. Laddy, Judge, Concurs.

**Motion to Dismiss.**

Defendants, Holekamp Lumber Company, a corporation, Carl H. Holekamp, Sr., Carl H. Holekamp, Jr., Robert L. Broderick, Rose Marie Broderick, Nancy L. Gordon, and Alice Ruth King move this Court that it make and enter its order dismissing the Information in Quo Warranto herein with prejudice on the ground that:

1. Said information fails to state facts upon which relief can be granted.

2. The Relators have no special interest of the sort necessary to entitle them to bring an action in quo warranto against these Defendants.

(Filed July 22, 1958.)

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Thereafter, and on September 19, 1958, the following memorandum was filed in this cause:

"Defendants' Motions to Dismiss the Information briefed and submitted on oral argument."

(Filed September 19, 1958.)

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Thereafter, and on September 29, 1958, the following order was entered by the Court in this cause:

"1. Motion of defendants Holekamp Lumber Company, a corp., et al., to Dismiss, sustained.

"2. Motion of individual defendants to dismiss sustained.

(Signed) "Noah Weinstein,
Judge."

## APPENDIX B.

### Title 23, Chapter 351, Section 351.085, R. S. Mo. (V. A. M. S. 1949), L. 1943, p. 410, Sec. 55.

### 351.085. Amendment of articles of incorporation

1. A corporation may amend its articles of incorporation, from time to time, in any and as many respects as may be desired; provided, that its articles of incorporation as amended contain only such provisions as might be lawfully contained in original articles of incorporation if made at the time of making such amendment, and, if a change in shares or an exchange or reclassification of shares is to be made, such provisions as may be necessary to effect such change, exchange or reclassification as may be desired and as is permitted by this chapter.

2. In particular, and without limitation upon such general power of amendment, a corporation may amend its articles of incorporation from time to time so as

(1) To change its corporate name;

(2) To change its period of duration;

(3) To change, enlarge or diminish its corporate purposes;

(4) To increase or decrease the number of its directors to not more than twenty-one, nor less than three;

(5) To increase or decrease the aggregate number of shares or shares of any class which the corporation has authority to issue;

(6) To increase or decrease the par value of the authorized shares of any class having a par value, whether issued or unissued; provided, that if the par value of issued shares is increased, there shall be transferred to stated

capital at the time of such increase an amount of surplus equal to the aggregate amount by which the par value is increased;

(7) To exchange, classify, reclassify or cancel all or any part of its shares, whether issued or unissued,

(8) To change the designation of all or any part of its shares, whether issued or unissued, and to change the preferences, qualifications, limitations, restrictions and special or relative rights including convertible rights in respect of all or any part of its shares, whether issued or unissued;

(9) To change shares having a par value, whether issued or unissued, into the same or a different number of shares without par value, and to change shares without par value, whether issued or unissued, into the same or a different number of shares having a par value;

(10) To create a new class or classes of stock and to define the preferences, qualifications, limitations, restrictions, and the special or relative rights of the shares of such new class or classes (L. 1943, p. 410, paragraph 55).

**Title 23, Chapter 351, Section 351.090, R. S. Mo. (V. A. M. S. 1949), L. 1943, p. 410, Sec. 56.**

**351.090. Amendments, how made**

1. Amendments to the articles of incorporation shall be made in the following manner:

(1) The board of directors shall adopt a resolution setting forth the proposed amendment and directing that it be submitted to a vote at a meeting of shareholders, which may be either an annual or a special meeting;

(2) Written or printed notice setting forth the proposed amendment or a summary of the changes to be effected

thereby shall be given to each shareholder of record entitled to vote at such meeting within the time and in the manner and upon the conditions provided in section 351.230 for the giving of notice of meetings of shareholders.

(3) At such meeting a vote of the shareholders entitled to vote thereat shall be taken on the proposed amendment. The proposed amendment shall be adopted upon receiving the affirmative vote of a majority of the outstanding shares entitled to vote, provided, however:

(a) That if any amendment provides for the creation or increase of preferential shares, then such amendment shall be adopted only upon receiving, in addition to the affirmative vote of the majority of all other outstanding shares entitled to vote, the following vote of each other class of shares, voting as a separate class, whether by the terms of the articles of incorporation such class be entitled to vote or not, over which such new or additional preferential shares would have a priority or with which such new or additional preferential shares would participate;

a. In the case of corporations existing prior to the passage of this chapter, the articles of incorporation of which do not provide for the adoption of such an amendment upon a specified vote, the affirmative vote of at least seventy-five percent of the outstanding shares of each such class which is subject to such priority or participation;

b. In the case of corporations existing prior to the passage of this chapter, or of corporations organized under this chapter, the articles of incorporation of which do provide for the adoption of such an amendment upon a specified vote of such class of shares, the affirmative vote, but not less than a majority, of each such class, which is subject to said priority or participation, as specified in the articles of incorporation; and

c. In case of corporations organized under this law the articles of incorporation of which do not provide for the adoption of such an amendment upon a specified vote of such class, the affirmative vote of at least a majority of each such class which is subject to said priority or participation; and

(b) That if any amendment would alter or change the preferences, priorities, special rights or special powers given to any one or more classes of preferential shares by the articles of incorporation so as to affect such class or classes adversely, then the shareholders of each such class of preferential shares so affected by any such amendment shall vote thereon, whether by the terms of the articles of incorporation such class be entitled to vote or not, and the following vote of each such class of preferential shares so affected by the amendment shall be necessary to the adoption thereof, in addition to the affirmative vote of a majority of all other outstanding shares entitled to vote, namely:

a. In the case of corporations existing prior to the passage of this chapter, the articles of incorporation of which do not provide for any such change or alteration upon a specified vote; the unanimous vote of each such class;

b. In the case of corporations existing prior to the passage of this chapter, the articles of incorporation of which do provide for any such change or alteration on a specified vote, the affirmative vote of each such class as specified in the articles of incorporation, but not less than a majority of each such class;

c. In the case of corporations organized under this chapter, the articles of incorporation of which do not provide for any such change or alteration upon a specified vote, the vote of holders of seventy-five per cent of the outstanding shares of each such class; and

d. In the case of corporation organized under this chapter, the articles of incorporation of which do provide for

any such change or alteration upon a specified vote, the affirmative vote of each such class as specified in the articles of incorporation, but not less than a majority of each such class. Nothing contained in this subparagraph (b) of subdivision (3) shall be construed to apply to any amendment providing only for the creation or increase of shares of any one or more classes.

(4) In the case of corporations existing prior to the passage of this chapter, if the creation or increase of one or more classes of preferential shares is authorized by the affirmative vote of seventy-five percent of the outstanding shares of any class or classes, voting as a class, as set out under subparagraph a. of paragraph (a) of subdivision (3) of this subsection 1, then any holder of shares over which such new or additional preferential shares would have a priority or with which such new or additional preferential shares would participate, who shall not have voted in favor of the proposal to authorize said class or classes of preferential shares, but at or prior to the meeting at which said proposal is submitted to a vote, shall file with the corporation written objections thereto, may, within twenty days after the vote was taken, made written demand on the corporation for the payment to him of the fair value of his shares as of the day prior to the date on which the vote was taken authorizing the creation or increase of said preferential shares. Such demand shall state the number and class of shares owned by such dissenting shareholder. Any shareholder failing to make demand within the twenty day period shall be conclusively presumed to have consented to the creation or increase of said preferential shares and shall be bound by the terms thereof. If, within thirty days after the day upon which such vote was taken, the value of such shares is agreed upon between the dissenting shareholder and the corporation, the corporation shall make payment of the agreed value within ninety days after the day on which the vote

was taken authorizing the creation or increase of said preferential shares, upon the surrender of his certificate or certificates representing the shares held by him. Upon payment of the agreed value, the dissenting shareholder shall cease to have any interest in such shares or in the corporation. If, within such period of thirty days, the dissenting shareholder and the corporation do not so agree, then the dissenting shareholder may, within sixty days after the expiration of the thirty-day period, file a petition in any court of competent jurisdiction within the county in which the registered office of the corporation is situated, asking for a finding and determination of the fair value of the shares held by such shareholder and shall be entitled to a judgment against the corporation for the amount of such fair value as of the day prior to the date on which such vote was taken, together with interest thereon to the date of such judgment. The judgment shall be payable only upon and simultaneously with the surrender to the corporation of the certificate or certificates representing said shares. Upon payment of the judgment, the dissenting shareholder shall cease to have any interest in such shares or in the corporation. Unless such dissenting shareholder shall file such petition within the time herein limited, such shareholder and all persons claiming under him shall be conclusively presumed to have ratified the creation or increase of said preferential shares and shall be bound by the terms thereof. Shares acquired by the corporation pursuant to the payment of the agreed value thereof or to the payment of any judgment entered therefor, as in this subdivision (4) provided, may be held or disposed of by the corporation as it shall see fit.

(5) If any amendment made under section 351.085 effects a reduction of stated capital, then the corporation making such amendment shall comply with the applicable provisions of sections 351.195 and 351.200, as well as the provisions of this section.

2. Any number of amendments may be submitted to the shareholders and voted on by them at one meeting (L. 1943, p. 410, paragraph 56, A. L. 1945, p. 696).

**Title 23, Chapter 351, Section 351.690, R. S. Mo. (V. A. M. S.), L. 1943, p. 1410, Sec. 171.**

**351.690. Applicability of this chapter to existing corporations**

The provisions of this chapter shall be applicable to existing corporations as follows:

(1) Those provisions of this law requiring report, registration statements, antitrust affidavits, and the payment of taxes and fees, shall be applicable, to the same extent and with the same effect, to all existing corporations, domestic and foreign, which were required to make such reports, registration statements and antitrust affidavits, and to pay such taxes and fees, prior to the enactment of this law;

(2) No provisions of this law, other than those mentioned in subdivision (1), shall be applicable to banks, trust companies, insurance companies, building and loan associations, savings bank and safe deposit companies, mortgage loan companies, and nonprofit corporations;

(3) Only those provisions of this law which supplement the existing laws applicable to railroad corporations, union stations, co-operative companies for profit, credit unions, street railroads, telegraph and telephone companies, booming and rafting companies and exposition companies, and which are not inconsistent with, or in conflict with the purposes of, or are not in derogation or limitation of, such existing laws, shall be applicable to the type of corporations mentioned above in this subdivision (3); and without limiting the generality of the foregoing, those provisions of this chapter which permit the issuance of shares without

par value and the amendment of articles of incorporation for such purpose, shall be applicable to railroad corporations, union stations, street railroads, telegraph and telephone companies, and booming and rafting companies, and those provisions of this law mentioned in subdivision (1) will apply to all corporations mentioned in this subdivision (3).

(4) All of the provisions of this law to the extent therein provided shall apply to all other corporations, existing under prior general laws of this state and not specifically mentioned in subdivisions (1), (2) and (3) of this section. (L. 1943, p. 410, paragraph 171, A. L. 1945, p. 696)

**Title 23, Chapter 351, Section 351.695, R. S. Mo. (V. A. M. S. 19.9), L. 1943, p. 1410, Sec. 174.**

**351.695. Law not to affect rights, privileges, immunities and franchises, suits pending, etc., under provisions of prior laws**

All rights, privileges, immunities and franchises vested or accrued under the provisions of any law in force prior to the enactment of this chapter; and all pending suits and rights of action conferred shall not be impaired, diminished or affected hereby, or by the repeal of any such prior laws. Any liability or penalty incurred under prior laws prior to the repeal thereof shall not be impaired, diminished or affected hereby. All acts and laws not expressly repealed hereby shall contitnue in full force and effect. (L. 1943, p. 410, paragraph 174)

**Chapter 12, Article I, Section 958, R. S. 1899.**

Section 958. **Amendments to articles of incorporation—construction of act—tax on increase of stock**

All amendments to articles of association of corporations organized under the laws of this state, made and

filed in the office of the secretary of state, are and shall be and become a part of the articles of association of the corporation adopting and filing the same; and this section shall not be so construed as to give any corporation whose articles are amended as in this article contemplated, any greater rights than though the subject of the amendments had been incorporated into the original articles of association; and any corporation, company or association which may increase its capital stock under the provisions of this article shall pay the additional amount provided by law for such increase.

**Chapter 12, Article I, Section 972, R. S. 1899.**

Section 972. **What powers shall vest in corporations—those organized under other laws may accept the provisions of this chapter, how**

The powers enumerated in the preceding section shall vest in every corporation that shall hereafter be created or organized, and any corporation, including those heretofore organized and now in existence under any general or special law of this state, may accept the provisions of the general laws of this state relating to corporations, by filing with the secretary of state a certificate of such acceptance, signed by its president and secretary, duly authorized by its board of directors and approved by a vote of three-fourths of its stockholders, at any meeting duly and legally called for that purpose—notice of such meeting first having been given in manner and form as provided in sections 962 and 963 of this article, or by three-fourths of the stockholders, in writing; and upon the filing of such certificate, the time of the existence of said corporation shall be extended for such period as was originally permissible to it, or as may be stated in its certificate of acceptance. But nothing herein contained shall extend or continue to any corporation organized or existing under

a special law or charter any special privilege, immunity, franchises or exemptions not possessed by corporations organized under the general laws of this state; and any corporation organized or existing under special law or charter shall, by accepting or availing itself of the provisions of this section, be deemed and held to thereby waive and surrender any and all such special privileges, immunities, franchises and exemptions, and it shall be subject to all the duties and obligations of corporations under the general laws of this state; **Provided, further,** that the duration of such corporation shall not be continued as aforesaid, until such corporation shall pay into the state treasury fifty dollars for the first fifty thousand or less of the capital stock of the corporation, and a further sum of five dollars for every additional ten thousand dollars of its capital stock, as provided by law; **provided,** that nothing in this section contained shall be construed to authorize the renewal, continuance or extension of the charter of any company engaged in the manufacture or sale of illuminating gas."

**Title 36, Chapter 531, Section 531.010, R. S. Mo. (V. A. M. S. 1949).**

531.010. **Exhibition of information, when—by whom**

In case any person shall usurp, intrude into or unlawfully hold or execute any office or franchise, the attorney general of the State, or any circuit or prosecuting attorney of the county in which the action is commenced, shall exhibit to the circuit court, or other court having concurrent jurisdiction therewith in civil cases, an information in the nature of a quo warranto, at the relation of any person desiring to prosecute the same; and when such information has been filed and proceedings have been commenced, the same shall not be dismissed or discontinued without the consent of the person named therein as the

relator; but such relator shall have the right to prosecute the same to final judgment, either by himself or by attorney. If such information be filed or exhibited against any person who has usurped, intruded into or is unlawfully holding or executing the office of judge of any judicial circuit, then it shall be the duty of the attorney general of the state, or circuit or prosecuting attorney of the proper county, to exhibit such information to the circuit court of some county adjoining and outside of such judicial circuit, and nearest to the county in which the person so offending shall reside.

## APPENDIX C.

### Information In Quo Warranto, Paragraph 11.

11. Relators believe that if Title 23, Chapter 351, Section 351.090-1-(3), V. A. M. S. 1949 is held to be applicable and controlling in this instance in spite of the provisions of Section 351.695 thereof, then said Chapter and Section is unconstitutional in that said Section as applied to relators in the instant regard is in derogation of and violates Article 1, Section 13, of the Missouri Constitution 1945 and the corresponding provisions of the prior Missouri Constitutions, in that said statute impairs and abrogates the vested contract rights and privileges of relators, and in that said Section, as applied to relators in this regard, authorizes a retrosepctive law or ex post facto law. Relators further state that if Title 23, Chapter 351, Section 351.090 and Section 351.695 of V. A. M. S. 1949 are applicable and controlling on plaintiffs in the manner set out above, said Statutes are in derogation of and violate the Constitution of the United States, Article 1, Section 10, in that said sections deprive relators of their vested rights, are retroactive in their operations and impair the obligations of relators' contract. The Court is asked to take judicial notice of the Missouri and United States constitutional provisions mentioned above.

### Information in Quo Warranto, Paragraph 13.

13. Relators believe that said Certificate of Amendment as voted and filed by the corporation and the defendants is void and of no effect, having been passed and voted unlawfully and contrary to relators' vested rights and privileges as aforesaid.

**Missouri Rules of Civil Procedure, Rule 83.16.**

**83.16. Motions for Rehearing**

Motions for rehearing shall briefly and distinctly state the grounds upon which a rehearing is sought. They may be accompanied by suggestions in support containing citation of authorities. Such motion must be filed within fifteen days after the opinion of the court shall be filed, and the motion and suggestions must be served on the adverse party or his attorney within said time. After a cause has been once reheard, and the motion for rehearing overruled, no further motion for rehearing or motion to set aside the order overruling the motion for rehearing, by the same party, will be entertained by the court.

The sole purpose of a motion for rehearing is to call attention to material matters of law or fact overlooked or misinterpreted by the court, as shown by its opinion. Mere reargument of issues determined by the opinion will be disregarded.

If desired, suggestions in opposition to a motion for rehearing may be filed within ten days after the expiration of the time for the filing of such motion, and a copy of such suggestions shall be served on the adverse party or his attorney within said time.

**Missouri Rules of Civil Procedure, Rule 84.05 (h).**

84.05 (h) Final Determination. Any case coming to the Supreme Court after having been briefed on the merits in, and decided by, a court of appeals will be finally determined by the Supreme Court the same as on original appeal, whether such case comes to it by certification, transfer or certiorari. For the purpose of filing additional briefs, if any, and for oral argument, the parties shall retain the same position as appellant and respondent as in the court of appeals. If additional briefs are filed, the time for service and filing thereof shall be governed by Rule 83.06.

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FILED
APR 26 1961
JAMES R. BROWNING, Clerk

IN THE

# SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1960.

STATE OF MISSOURI ex inf. JOHN M. DALTON, Attorney General, ex rel. RICHARD E. HOLEKAMP, et al., Appellants,

vs.

HOLEKAMP LUMBER CO., a Corporation, et al., Appellees.

No. 870.

On Appeal from the Supreme Court of the State of Missouri.

## MOTION TO DISMISS APPEAL
and
## BRIEF IN SUPPORT THEREOF.

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## INDEX.


| | Page |
|---|---|
| Motion to Dismiss Appeal | 1 |
| Brief in Support of Motion to Dismiss | 2 |
| Question Presented | 2 |
| Statement of the Case | 3 |
| Argument | 4 |
| I. Even If the Statute of 1943 for the First Time Permitted Extension of a Corporate Term by a Simple Majority Vote, It Is Free From Constitutional Doubt, Because of Missouri's Reserved Power | 4 |
| II. The Right to Extend the Term of Holekamp Lumber Company by a Simple Majority Vote Existed From the Beginning; Hence There Was No Possible Impairment of Contract | 9 |
| Conclusion | 12 |


### Table of Cases, Text Books and Statutes.


| | |
|---|---|
| Atlantic Coast Line R. R. Co. v. Phillips, 332 U. S. 168, 67 S. Ct. 1584, 91 L. Ed. 1977 (1947) | 8 |
| City of New Orleans v. New Orleans Waterworks Co., 142 U. S. 79, 12 S. Ct. 142, 35 L. Ed. 943 (1891) | 9 |
| Close v. Glenwood Cemetery, 107 U. S. 466, 2 S. Ct. 267, 27 L. Ed. 408 (1883) | 6-7 |
| Coombes v. Getz, 285 U. S. 434, 52 S. Ct. 435, 76 L. Ed. 866 (1932) | 7, 8, 9 |
| Dodge v. Board of Education of Chicago, 302 U. S. 74, 58 S. Ct. 98, 82 L. Ed. 57 (1937) | 8 |
| Hale v. Iowa State Board of Assessment and Review, 302 U. S. 95, 58 S. Ct. 102, 82 L. Ed. 72 (1937) | 8 |

Long Sault Development Co. v. Call, 242 U. S. 272, 37 S. Ct. 79, 61 L. Ed. 294 (1916) ..... 9
Looker v. Maynard ex rel. Dusenbury, 179 U. S. 46, 21 S. Ct. 21, 45 L. Ed. 79 (1900) ..... 5, 6

Miller v. New York, 15 Wall. 478, 21 L. Ed. 98 (1873) 6
Missouri ex rel. Hurwitz v. North, 271 U. S. 40, 46 S. Ct. 384, 70 L. Ed. 818 (1926) ..... 8

Phillips Petroleum Co. v. Jenkins, 297 U. S. 629, 56 S. Ct. 611, 80 L. Ed. 943 (1936) .....4, 5, 6, 12
Polk v. Mutual Reserve Fund Life Association, 207 U. S. 310, 28 S. Ct. 65, 52 L. Ed. 222 (1907) ..... 7

Sherman v. Smith, 1 Black. 587, 17 L. Ed. 163 (1862) 6
Smith v. Eastwood Wire Manufacturing Co., 58 N. J. Eq. 331, 43 A. 567 (1899) ..... 6

Trustees of Dartmouth College v. Woodward, 4 Wheat. 518, 4 L. Ed. 629 (1819) .....5, 8, 9

---

Fletcher, Cyclopedia of Corporations, Section 3668 ... 5
Journal of the Missouri Constitutional Convention, 1875 (State Historical Society of Missouri), Vol. 1, pp. 178-179; Vol. 2, pp. 527-528, 831 ..... 4
Debates, Constitutional Convention of 1875 (State Historical Society of Missouri), Vol. VIII, pp. 364-399, 490-493 ..... 4

---

Constitution of Missouri, 1875 ..... 2, 3
Revised Statutes of Missouri, 1899, Section 958 ....3, 10, 11
Revised Statutes of Missouri, 1899, Section 972 ....3, 10, 11

IN THE

# SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1960.

| | |
|---|---|
| STATE OF MISSOURI ex inf. JOHN M. DALTON, Attorney General, ex rel. RICHARD E. HOLEKAMP, et al., Appellants, vs. HOLEKAMP LUMBER CO., a Corporation, et al., Appellees. | No. 870. |

On Appeal from the Supreme Court of the State of Missouri.

## MOTION TO DISMISS APPEAL.

Appellees, pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, move that the appeal to this Court from the final judgment of the Supreme Court of Missouri be dismissed, on the ground that it does not present a substantial federal question.

EUGENE H. BUDER,

LEONARD E. MARTIN,
Attorneys for Appellees.

# BRIEF IN SUPPORT OF MOTION TO DISMISS.

## QUESTION PRESENTED.

Appellees take exception to Appellants' statement of the question presented, both in the notice of Appeal and in the Jurisdictional Statement, for omitting the essential element of the opinion of the Supreme Court of Missouri, which is that the Missouri Legislature had reserved power over corporate charters in 1908 at the time of the incorporation of Holekamp Lumber Company. Appellees further take exception to Appellants' statement of the question presented for postulating that the authority to extend the corporate duration by a simple majority vote of the shareholders came only from the statutes enacted in 1943 now under attack by Appellants. Appellees restate the question presented as follows:

Where in the Constitution of 1875, as construed by the Supreme Court of Missouri, the state reserved the power to its Legislature to repeal, change, or amend, by general laws, the general laws authorizing corporations to be formed and the general laws pertaining to amendment of corporate charters, and where Holekamp Lumber Company was incorporated in 1908 under general law for a period of fifty years, the maximum then permissible, and extended its duration for an additional period of fifty years in 1957 by a vote of 58% of its shareholders pursuant to definite statutory authority enacted in 1943, assuming that such an extension could have been made only by the vote of three-fourths of the shareholders prior to the 1943 enactment, does the statute of 1943, in violation of the Federal Constitution, impair the obligation of any contract of the minority shareholders who opposed the extension?

## STATEMENT OF THE CASE.

Appellants' Statement of the Case likewise omits all reference to reserved power and the Missouri Constitution of 1875. At 340 S. W. 2d 680-681 (pp. 21-24 of the Jurisdictional Statement) the Supreme Court of Missouri construes the pertinent parts of that constitution, and concludes: "We, therefore, hold that the 1875 Constitution did contain a sufficient reservation to permit our Legislature to adopt general laws authorizing amendments to articles of incorporation of existing corporations, organized under general laws, to be made by a majority vote of their shareholders."

Appellants' statement, in referring to R. S. Mo. 1899, under which Holekamp Lumber Company was organized, sets out part of Section 972 thereof, providing for accepting the general corporation laws by a three-fourths vote and taking an extension of duration incidental thereto, but makes no mention of Section 958, R. S. Mo. 1899, which authorized charter amendments in general terms, only restricting them to powers that could originally have been invoked by the corporation. The Jurisdictional Statement, however, does cite Section 958 as a statute involved, and sets it out at pp. 65-66. Section 958 is treated by the opinion of the Supreme Court of Missouri at 340 S. W. 2d 682-683 (Jurisdictional Statement, pp. 26-27).

## ARGUMENT.

**I. Even if the Statute of 1943 for the First Time Permitted Extension of a Corporate Term by a Simple Majority Vote, It Is Free From Constitutional Doubt Because of Missouri's Reserved Power.**

The Supreme Court of Missouri held that the State, under its Constitution of 1875 (in effect until 1945), had reserved the power to its Legislature to repeal, change, or amend, by general laws, the general laws authorizing corporations to be formed, and the general laws pertaining to charter amendments (340 S. W. 2d at 680-681, 683; Jurisdictional Statement, pp. 21-24, 28). This finding of reserved power with respect to the charters of corporations such as Holekamp is the very heart of the opinion. This finding is clearly right. The Court construes the words of the Constitution to find the necessary intent of the constitutional convention. That such was indeed the intent of the framers is shown by the record of their debates. Journal of the Missouri Constitutional Convention, 1875 (State Historical Society of Missouri), Vol. 1, pp. 178-179, Vol. 2, pp. 527-528, 831; Debates, Constitutional Convention of 1875 (State Historical Society of Missouri), Vol. VIII, pp. 364-399, 490-493.

Appellants do not now question the correctness of the Missouri Supreme Court's finding of reserved power. They recognize such finding and claim only: "Both the St. Louis Court of Appeals and the Supreme Court held that the only way Appellees' action could be sanctioned is by a holding that no Constitutional right was involved" (Jurisdictional Statement, pp. 14-15). But no constitutional right is involved; exactly such a holding was made by this Court in **Phillips Petroleum Co. v. Jenkins**, 297 U. S. 629, 634; 56 S. Ct. 611, 613; 80 L. Ed. 943, 947-948 (1936); where reserved power becomes part of the contract

between the state and the corporation, as in the case at bar, the clause of the Federal Constitution on obligation of contacts does not apply. There is really nothing more to argue about; Appellants are relying solely on Article I, Section 10 of the Federal Constitution (Impairment of the Obligation of Contracts) (Jurisdictional Statement, pp. 6-7, 8-9; the Notice of Appeal refers only to this clause). Although the principle is well established by the **Phillips** case, we discuss very briefly the history of reserved power as treated in other cases decided by this Court.

In response to Justice Story's concurring opinion in **Trustees of Dartmouth College v. Woodward**, 4 Wheat. 518, 712, 4 L. Ed. 629, 677 (1819), virtually all the states of the Union put reserved power over corporations into their constitutions or statutes (Fletcher, Cyclopedia of Corporations, Vol. 7, Section 3668, Note 9). By the decision now appealed from, Missouri was simply shown to be in the same position as virtually all the other states. Since the Missouri Legislature had this reserved power, the enactment of the Corporation Code of 1943 (including the sections thereof now under attack) was an exercise of that power to the extent necessary to the validity of the new code. Under an unbroken line of decisions of this Court, this crucial element of reserved power precludes all constitutional doubt concerning the statutes presently under attack.

In the leading case of **Looker v. Maynard ex rel. Dusenbury**, 179 U. S. 46, 52; 21 S. Ct. 21, 23; 45 L. Ed. 79, 81 (1900), this Court held:

> "The effect of such a provision, whether contained in an original act of incorporation, or in a constitution or general law subject to which a charter is accepted, is, at the least, to reserve to the legislature the power to make any alteration or amendment of a

charter subject to it, which will not defeat or substantially impair the object of the grant, or any right vested under the grant, and which the legislature may deem necessary to carry into effect the purpose of the grant, or to protect the rights of the public or of the corporation, its stockholders or creditors, or to promote the due administration of its affairs."

This doctrine was approved in **Phillips Petroleum Co. v. Jenkins**, 297 U. S. 629, 56 S. Ct. 611, 80 L. Ed. 943 (1936), which appears to be the last word on the subject by this Court. In the **Looker** case, supra, this Court upheld a Michigan statute imposing compulsory cumulative voting on a corporation, against the objection of the majority shareholders that this law impinged on a vested right of theirs to elect the entire board of directors. The Court thus expressly held that reserved power extends to contractual relations **among the shareholders**, explaining its position by reference to prior cases and the dissents therein. Now the duration of a corporate charter, presently before this Court, is a matter which prima facie concerns the state only (opinion of Sup. Ct. of Mo., 340 S. W. 2d at 682, Jurisdictional Statement at pp. 25-26, citing with approval **Smith v. Eastwood Wire Mfg. Co.**, 58 N. J. Eq. 331, 43 A. 567, 568). Insofar, however, as the minority shareholders may have an interest in the limitation of the corporate period, that interest is clearly defeasible under the **Looker** doctrine.

Other Supreme Court cases holding contractual rights of shareholders to be within the reserved power, and hence subject to changes imposed or authorized by subsequent law, are the following: **Sherman v. Smith**, 1 Black. 587, 17 L. Ed. 163 (1862) (imposing individual liability on shareholders of a bank); **Miller v. New York**, 15 Wall. 478, 21 L. Ed. 98 (1873) (reduction in voting power of incorporators from power to elect nine directors out of thirteen, to power to elect only six out of thirteen); **Close v. Glen-**

**wood Cemetery**, 107 U. S. 466, 2 S. Ct. 267, 27 L. Ed. 408 (1883) (removing control of an incorporated cemetery from original proprietors to a board of trustees, and limiting the future returns to the original proprietors, to one-fourth of the receipts); **Polk v. Mutual Reserve Fund Life Association**, 207 U. S. 310, 28 S. Ct. 65, 52 L. Ed. 222 (1907) (changing insurance of members from assessment plan to flat premium "old line" insurance). It is submitted that all these changes are more drastic than extending the corporate term. In **Coombes v. Getz**, 285 U. S. 434, 441-442, 52 S. Ct. 435, 436, 76 L. Ed. 866, 871 (1932), this Court refused to let the reserved power extend so far as to permit cutting off the vested quasi-contractual right of a corporate **creditor** against directors of the corporation, but expressly recognized once again that reserved power does extend to changing the interrelations of state, corporation, and stockholders.

This Court has apparently never passed specifically on the constitutionality of extending a corporate charter under subsequent law enacted pursuant to reserved power, but the question is clearly answered in principle by the cases just discussed, and in the affirmative. Such extension, moreover, has been specifically approved, against charges of impairment of obligation of contract, by all the state courts whose opinions are cited by the Supreme Court of Missouri, 340 S. W. 2d at 628, Jurisdictional Statement at pp. 25 and 26, and by the St. Louis Court of Appeals, 331 S. W. 2d at 177-179, Jurisdictional Statement at pp. 39-43. (The Court of Appeals distinguished these cases on the theory that Missouri had no reserved power.) Appellants have never cited, and do not now cite, a single case holding that such an extension violates the clause against impairing the obligation of contracts or any other provision of the Constitution.

Concerning the construction placed upon the state Constitution of 1875 by the Supreme Court of Missouri, to the

effect that the constitution did contain reserved power over corporate charters, Appellants do not even suggest that that construction should be reviewed by this Court. To some extent at least, they say they have never questioned it (Jurisdictional Statement, p. 14). The general rule is that the construction of state constitutional provisions or statutes by the highest court of the state is binding on this Court. **Missouri ex rel. Hurwitz v. North**, 271 U. S. 40, 46 S. Ct. 384, 70 L. Ed. 818 (1926). True, an exception to this rule has been made in cases on obligation of contract (**Coombes v. Getz, supra**), but even there the state construction is to be given great weight, **Dodge v. Board of Education of Chicago**, 302 U. S. 74, 58 S. Ct. 98, 82 L. Ed. 57 (1937), and will be followed unless manifestly wrong. **Hale v. Iowa State Board of Assessment and Review**, 302 U. S. 95, 58 S. Ct. 102, 82 L. Ed. 72 (1937); **Atlantic Coast Line R. R. Co. v. Phillips**, 332 U. S. 168, 67 S. Ct. 1584, 91 L. Ed. 1977 (1947). Here Missouri has interpreted its 1875 Constitution, not so as to give the state extraordinary or novel powers, but only to give it such powers as it certainly did have under its 1865 Constitution (340 S. W. 2d at 680, Jurisdictional Statement at p. 22), certainly could have without violating the Federal Constitution, and such powers as virtually every state has successfully claimed for itself since the decision of the **Dartmouth College** case. The decision now appealed from potentially affects every extant Missouri corporation formed between 1875 and 1943, and sets at rest, once and for all, vague doubts that have heretofore been entertained concerning the powers of those corporations to modernize themselves in keeping with current law. Practically speaking, the decision restores Missouri to its competitive position in holding and attracting corporate business with its home base in Missouri, after a long period of vague uneasiness and a short panic caused by the opinion of the St. Louis Court of Appeals. On broad lines of policy, there is nothing in a federal sys-

tem requiring federal review of a state decision which so eminently well disposes of a state problem.

Even on narrow legal grounds, there is no call for review of the state constitutional interpretation here involved. The broadest authority asserted by this Court is that it will deferentially re-examine the facts said to have given rise to the contract and the law said to have impaired it. **Coombes v. Getz, supra.** Here these questions are not open: there was a contract in the form of the corporate charter under the **Dartmouth College** doctrine, but its obligation was not impaired if the state had reserved power at the time of incorporation. The only open question is the underlying one of whether Missouri had such reserved power, answered in the affirmative by the Supreme Court of Missouri. State construction of such underlying questions of state law will not be reviewed by the Supreme Court. **City of New Orleans v. New Orleans Waterworks Co.**, 142 U. S. 79, 12 S. Ct. 142, 35 L. Ed. 943 (1891); **Long Sault Development Co. v. Call**, 242 U. S. 272, 37 S. Ct. 79, 61 L. Ed. 294 (1916).

To sum up, there is no reason why this Court should review Missouri's finding of reserved power in its former constitution, which is certainly not manifestly wrong, and once reserved power is in the case there is no substantial federal question, because it has been repeatedly held by this Court that reserved power takes a corporate charter out of the class of contracts protected against impairment of obligation by the Federal Constitution, even as to rights of shareholders claimed under the charter.

II. **The Right to Extend the Term of Holekamp Lumber Company by a Simple Majority Vote Existed From the Beginning; Hence There Was No Possible Impairment of Contract.**

Appellees contended in the Missouri courts that a simple majority of the shareholders had the power under the cor-

poration laws of Missouri in effect in 1908 to extend the corporate term for an additional period of fifty years, as was done by Holekamp Lumber Company in 1957. In this additional respect, we take exception to Appellants' statement of the question on appeal, because it postulates that only the corporation Code of 1943 authorized an extension by a simple majority. We submit that the Supreme Court of Missouri held, or almost held, that in 1908 stockholders could extend the corporate term by a simple majority vote. If this Court should review that decision, it would undoubtedly come to the same conclusion, particularly as it deferred to the Missouri Court's construction of the pertinent Missouri statutes. On this view there would be no significant change in the law between 1908 and 1943, and hence no possible impairment of contract.

This question breaks down to determining whether such an extension could be effected under Revised Statutes of Missouri 1899, Section 958, generally authorizing charter amendments, as distinguished from Section 972, which pertained to accepting the new laws, requiring a three-fourths majority therefor, and granting an extension incidental to such acceptance. The St. Louis Court of Appeals considered the question at length, and decided it against Appellees (331 S. W. 2d at 181-184, Jurisdictional Statement at pp. 48-54). We submit that the Supreme Court of Missouri also decided the question, although somewhat unobtrusively, and decided it in favor of Appellees and the existence of the prior power (340 S. W. 2d at 682-683, Jurisdictional Statement, at pp. 26-27). The Court held that only specially chartered corporations (not Holekamp) were intended to accept the general laws under Section 972, and that corporations organized under general laws (like Holekamp) were included in the terms of Section 972 "undoubtedly" for the purpose of collecting a fee from them when they extended. The opinion also suggests that the three-fourths vote was required only be-

cause there was a question of relinquishing the special privileges conferred by a special incorporation. Then the opinion refers to Section 958, generally authorizing amendments, and cites an earlier case holding it in pari materia with Section 972, and requiring the tax to be paid under Section 972 when extension was made by **charter amendment.** Only Section 958, not Section 972, authorized charter amendments. The conclusion is not expressly drawn by the Court, but we will draw it here: Section 972, insofar as it pertained to accepting the new laws, applied only to special-charter corporations, and extension was incidental to such acceptance; insofar as it called for a tax on extension it applied to all corporations; Section 958 applied generally to amendments and was in pari materia with 972; taking the two together, a general-law corporation extending by corporate amendment had to pay the tax called for by Section 972; but since the acceptance provisions (and hence the incidental extension provisions) of 972 were not intended to apply to such a corporation, its power of extension, clearly recognized here and in the earlier case cited, could only have come from Section 958. And the earlier case, as stated in the current opinion, recognized **extension by charter amendment,** which means by Section 958. It was never expressly decided what majority was required under Section 958, as the opinion observes; but in the absence of any special requirement imposed by statute or decision, on general principles or corporation law, a simple majority was enough. (Note again the Court's suggestion that a three-fourths vote was required only for purposes of relinquishing special privileges.) All the foregoing premises are stated in the Court's opinion, and the conclusion necessarily follows. It is submitted that the only reason why the conclusion was not drawn as we have drawn it is that the Court considered that the question would never arise again. If a conclusion were forced, it would inevitably be as above stated.

## CONCLUSION.

The appeal should be dismissed because the federal question raised by Appellants is insubstantial. Appellants do not question the Missouri Court's finding of reserved power. With reserved power in the case, the question has been decided against Appellants by a long line of decisions of this Court, that last of which (**Phillips Petroleum,** supra) states that there remains no constitutional question, and hence no federal question. Finally, a review would only confirm an additional ground for supporting the judgment: namely, that the statute under attack merely expressed more clearly what had always been the law and the contractual rights of the parties, and hence could not possibly have impaired those contractual rights.

Respectfully submitted,

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IN THE

# SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1960.

No. 870.

STATE OF MISSOURI ex inf. JOHN M. DALTON, Attorney General, ex rel. RICHARD E. HOLEKAMP, et al.,
Appellants,

vs.

HOLEKAMP LUMBER CO., a Corporation, et al.,
Appellees.

On Appeal from the Supreme Court of the State of Missouri.

## APPELLANTS' BRIEF IN OPPOSITION TO MOTION TO DISMISS APPEAL.

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## INDEX.


| | Page |
|---|---|
| Argument | 2 |
| Conclusion | 7 |


### Citations.


| | |
|---|---|
| Coombers v. Getz, 285 U. S. 434, 52 S. Ct. 435, 76 L. Ed. 866 (1932) | 3, 4 |
| Harry M. Viex v. Sixth Ward Building and Loan Association, 310 U. S. 32, 60 S. Ct. 794, 84 L. Ed. 1061 (1940) | 4, 5 |
| Looker v. Maynard ex rel. Dusenbury, 179 U. S. 46, 21 S. Ct. 21, 45 L. Ed. 79 (1900) | 3, 4 |
| Phillips Petroleum Co. v. Jenkins, 297 U. S. 629, 56 S. Ct. 611, 80 L. Ed. 943 (1936) | 3 |
| Stockholders of Peoples Banking Company v. Sterling, 300 U. S. 175, 57 S. Ct. 386, 81 L. Ed. 586 (1937) | 5 |
| Trustees of Dartmouth College v. Woodward, 4 Wheat. 518, 4 L. Ed. 629 (1819) | 5 |

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On Appeal from the Supreme Court of the State of Missouri.

## APPELLANTS' BRIEF IN OPPOSITION TO MOTION TO DISMISS APPEAL.

Appellants respectfully urge the Court to overrule Appellees' Motion to Dismiss this appeal which motion is based on the alleged ground that the appeal does not present a substantial Federal question.

## ARGUMENT.

Appellants believe that their Statement of the question presented, their Statement of the case and presentation of the Federal question in the Jurisdictional Statement herein filed fairly presented the question before the Court. Rule 10 of this Court's rules requires brevity and provides that the Statement and Question, as well as the formal Notice of appeal, are deemed to include every subsidiary question fairly comprised therein. The Jurisdictional Statement contains in full the exact position of the Missouri Supreme Court as to the nature, extent and scope of the so-called "reserved power" over corporation charters. This reserved power in the Legislature to change and to authorize stockholders to change the corporate charter retroactively which the Missouri Court here held to have existed was not written out in the 1875 Missouri Constitution. The reservation therefore cannot be quoted. This case is the first opinion of the Missouri Court which revealed the existence of the power (Jurisdictional Statement pages 23 and 24).

The opinion of the Court which found the reservation also quite clearly defined its limitations. The "reservation" was defined as limited by the Federal Constitutional limitations of "police power, due process and obligations of contracts" (Jurisdictional Statement pages 24 and 26). Appellants' statement of the question asked whether the Federal Constitution authorized the acts of the majority stockholders here complained of, because the "reserved power" which sanctioned the statutes which enabled appellees to act, in the words of the Missouri Court, sanctioned such legislation only if such actions thereunder are within the three Federal Constitutional limitations above mentioned. Appellees' attempted restatement of the question assumes a defined uncircumscribed reservation of

power, which is the usual case. Likewise, the attempted restatement of Appellants' case fails to fully quote the opinion of the Missouri Court in that the statement on page 3 of the brief leaves out the very heart of this matter, namely, the limitations on the reserved power.

Appellees' argument rests mainly upon a sentence in this Court's opinion in **Phillips Petroleum Co. v. Jenkins**, 297 U. S. 629, 634, 56 S. Ct. 611, 613, 80 L. Ed. 943, 947-948 (1936). This Court said, "The reservation of power to amend is a part of the contract between the State and the corporation and therefore Section 10 of Article 1 of the Federal Constitution does not apply." Appellants submit that this Court there meant that the written and uncircumscribed legislative reservation of the Arkansas Statutes involved in that case did not apply and further that the words "does not apply" referred to the Phillips Case and any similar case. The next sentence of the opinion clearly refutes Appellees unlimited application of the quoted sentence for Mr. Justice Butler went on to spell out that the reserve power is not unlimited but must function within the scope of all Federal Constitutional provisions—referring to this Court's prior opinion in **Looker v. Maynard ex rel. Dusenbury**, 179 U. S. 46, 21 S. Ct. 21, 45 L. Ed. 79 (1900). The Phillips Petroleum Company decision pointed out early in the opinion that the sole question before the Court is whether the Arkansas Statute involved denies to the Appellant foreign corporation the equal protection of the Arkansas laws in violation of the Fourteenth Amendment. The question raised in the present appeal was not raised in the Phillips Petroleum Company appeal, and hence, was not there answered. Appellants submit that the Phillips' decision was not intended to overrule, nor has it been accepted as overruling, in any sense this Court's opinion in **Looker v. Maynard et al.**, supra, or this Court's opinion in **Coombers v. Getz**, 285

U. S. 434, 52 S. Ct. 435, 76 L. Ed. 866 (1932). Appellees use of the Phillips case, however, would so do. As stated above, the opinion of **Looker v. Maynard et al.** (supra) placed constitutional limitations on the use by a State Legislature of a reserved power over corporate contracts. The Looker case did not foreclose the applicability of Article 1, Section 10 of the Federal Constitution to all or any other type of reserved power. This Court's opinion in **Coomber v. Getz** (supra) again did not foreclose consideration under Article 1, Section 10 of the effect of corporation amendments made under a "reserved power" for the decision clearly rests on such grounds as to "third" parties. The dissenting opinion of Mr. Justice Cardozo repeated the phrase "The claim of an irrepealable contract cannot be predicated upon a contract which is repealable." This statement cannot be of help to Appellees here for the Missouri Court has held that the reserved power (repealable part of the contract) is irrepealable if a vested right or contract obligation is involved. The limitation of the Missouri reserved power defined by the Missouri Court gives substance to this appeal. As this Court stated in **Coombers v. Getz** (supra), as in many of its other opinions on this point, when the contract clause of the Federal Constitution is involved this Court for itself must determine the contract, the obligations arising thereunder, their possible impairment and the meaning and application of the State provision creating the contract or impairing its obligations. The Appellees' argument plays with words not substance. The argument in support of the motion seems to say: "The Federal Supreme Court holds that if there is a 'reserved power' there can be no impairment of contract obligation under the Federal Constitution. The Missouri Supreme Court holds that the Missouri reserved power cannot be used to impair a contract obligation under the Federal Constitution. The Missouri Supreme Court then holds that the law and actions here complained of are not

in violation of the Federal Constitution. Thus the Missouri Supreme Court is left as the final and only arbiter of a substantial Federal Constitutional question." This result is contrary to all decisions of this Court on the subject. The fallacy occurs because Appellees ignore the limited scope of the Missouri reserved power.

This Court's opinion in the case of **Stockholders of the Peoples Banking Company v. Sterling**, 300 U. S. 175, 57 S. Ct. 386, 81 L. Ed. 586 (1937) held that the amended legislation there involved did not violate a prior contract right; more properly a contract liability, of the stockholders to the corporation. The Court specifically held that this was true because the Appellants there could not show themselves harmed though the operation of the Statute they challenged as unlawful, and further because the appellant shareholders could show only that their relation to the corporation was altered. The appellants in the case at bar now before the court can show that they have been substantially harmed by the legislation challenged as unlawful. The right to determine the length of time that their investment shall be under the control of others was taken away from twenty-five percent of the shareholders of the Holekamp Lumber Company. These shareholders contract right was not diluted, it was abolished. Further this is a contract right which existed between the shareholders inter se, as distinguished from a contract right which existed between the shareholders and the corporation. This latter point raised in the **Trustees of Dartmouth College v. Woodward** opinions, 4 Wheat. 518, 4 L. Ed. 629 (1819) Appellants submit has not since been passed upon by this Court. This Court's opinion in **Harry M. Viex v. Sixth Ward Building and Loan Association**, 310 U. S. 32, 40, 60 S. Ct. 794, 84 L. Ed. 1061, 1066 (1940), which sanctioned the corporate contract amendment on the ground of the exercise of the State's police power, said in making

an analogous comparison, that the reserved power may be the grounds upon which the relations between the shareholders and the corporation may be varied without impairing the obligations of contract existing between the shareholders and the corporation. The Court did not go so far as to say that contract obligations existing between the shareholders inter se, as here involved, could be so voided under a reserved power theory. Appellants urge the Court to consider the distinct relationships inherent in the basic corporate contract—relation between the State and the Corporation—relation between the Stockholders and the Corporation—and the relationship between the Stockholders inter se. Violence to individual fundamental rights and duties existing between stockholders inter se, can and does often occur in majority control of corporations under modern corporation practice.

Appellees have construed this Court's prior opinions to hold that such distinct relationship does not exist and if it does, consideration of any change in that relationship cannot be considered by this Court in any case involving a "reserved power" provision. The proper determination of such a question is both Federal and substantial. As Appellees admit in their brief this question has heretofore not been passed upon by this Court and as they seem to admit on page 8 the question is of great importance to Missouri Corporation shareholders.

Appellants take specific exception to a point raised on page 9 of Appellees' brief under Point II of their argument, namely, the argument that the right to extend the duration of this Corporation by simple majority vote existed from the beginning of the Corporation. This argument is contrary to the Missouri Supreme Court's opinion (Jurisdictional Statement pages 20 and 21 and pages 26 and 27).

## CONCLUSION.

Appellants urge the Court to overrule Appellees' Motion to Dismiss. Appellants urge the Court to hear and determine this appeal as it presents for this Court's determination Substantial Federal Questions which have not heretobefore been before this Court and which the Court alone should finally determine.

Respectfully submitted,

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